TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 593.

CHRIST NIELSEN, PLAINTIFF IN ERROR,

vs.

THE STATE OF OREGON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OREGON.

FILED OCTOBER 29, 1906.

(21,389.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 5, 1908.

1 UNITED STATES OF AMERICA,
Supreme Court of Oregon, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the Complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court, in the city of Salem, Oregon, this 3d day of October, 1908.

[Seal of Supreme Court, State of Oregon, 1859.]

J. C. MORELAND,
Clerk of the Supreme Court of the State of Oregon.

2 In the Supreme Court of the State of Oregon.

STATE OF OREGON, Respondent,
vs.
CHRIST NIELSEN, Defendant and Appellant.

Appellant's Abstract of Record.

Appeal from a Judgment of the Circuit Court of the State of Oregon for Clatsop County.

Hon. Thomas A. McBride, Judge.

G. C. Fulton, Attorney for Appellant.
A. M. Crawford, Attorney-General, and Gilbert L. Hedges, District Attorney, Attorneys for Respondent.

(Endorsed:) Filed Oct. 25, 1907. J. C. Moreland, Clerk. By Arthur S. Benson, Deputy.

3 In the Supreme Court of the State of Oregon.

STATE OF OREGON, Respondent,
vs.
CHRIST NIELSEN, Defendant and Appellant.

Appellant's Abstract of Record.

Appeal from a Judgment of the Circuit Court of the State of Oregon for Clatsop County.

Hon. Thomas A. McBride, Judge.

G. C. Fulton, Attorney for Appellant.
A. M. Crawford, Attorney-General, and Gilbert L. Hedges, District Attorney, Attorneys for Respondent.

4 On the 26th day of July, 1907, there was filed in the Circuit Court of the State of Oregon for Clatsop County a

Transcript on Appeal from the Justice's Court of Astoria Precinct, Clatsop County, State of Oregon.

Containing a complaint as follows, to wit:

In the Justice Court, for the Precinct of Astoria, Clatsop County, State of Oregon.

STATE OF OREGON, Respondent,
vs.
CHRIST NIELSEN, Defendant and Appellant.

Christ Nielsen is accused by this complaint with the crime operating and maintaining a purse-net or purse-seine committed as follows, to-wit:

The said Christ Nielsen on the 20th day of July, 1907, in the County of Clatsop, State of Oregon, then and there being,
5 did wilfully and unlawfully operate and maintain within the waters of the State of Oregon, to-wit, the waters of the Columbia River, within said County of Clatsop, a certain purse-net or purse-seine for the purpose of catching and taking salmon fish contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon.

GILBERT L. HEDGES,
District Attorney,
By J. C. McCUE, *Deputy.*

STATE OF OREGON,
County of Clatsop, ss:

I, Ole J. Settem, being duly sworn, depose and say the foregoing complaint is true as I verily believe.

OLE J. SETTEM.

Subscribed and sworn to before me, this 20th day of July, 1907.
P. J. GOODMAN,
Justice of the Peace.

That said transcript showed that said complaint was filed in the Justice Court on the 20th day of July, 1907, and that on
6 the same date a warrant was duly issued thereon and placed in the hands of the sheriff of said county for service, and that said sheriff duly apprehended said defendant thereunder.

That said defendant duly appeared before said Justice Court and was duly *arranged* upon said complaint on the 22d day of July, 1907, and entered a plea of not guilty.

That trial was duly had before said court without a jury on the 22d day of July, 1907, upon said complaint and the plea of not guilty thereto.

That judgment of conviction was on the 22d day of July, 1907, duly rendered and entered in said cause by said Justice Court wherein said defendant was adjudged guilty of the crime charged in said complaint and was adjudged to pay a fine of $50.00.

That immediately upon the entry of such judgment of conviction, the said defendant in the manner provided by law, duly perfected an appeal from such judgment of conviction to the Circuit Court of the State of Oregon for Clatsop County, by duly serving and filing a notice of appeal, and appeal bond as by law required, said appeal being duly allowed by the court and proceedings
7 were duly stayed, and thereafter by filing a transcript of the material entries in the Justice's docket, together with the original papers in said action and the appeal thereof, with the clerk of the said Circuit Court, duly certified to as by law required, within the time by law required.

That thereafter and on the 26th day of July, 1907, the said cause was duly tried before the said Circuit Court for Clatsop County, without a jury, each party in open court waiving a jury, and the court consenting thereto, and on the 17th day of October, 1907, there was rendered and entered in said court a

Judgment,

as follows:

Now at this time coming on to be heard the above-entitled cause upon appeal from the Justice Court of the Precinct of Astoria, Clatsop County, Oregon, and the State of Oregon appearing by John C. McCue, Deputy District Attorney, and A. M. Crawford, Attorney-General, and the defendant appearing by his attorney, G. C. Fulton, and the respective parties hereto having stipulated in writing as to the facts and evidence in said cause and the same coming on to be heard at this time before this court and trial of the above
8 cause by jury having been waived by the parties hereto, and the court having read said stipulation, and having heard the evidence as stipulated, and hearing the argument of counsel and being fully advised in the premises and fully informed as to the law herein.

It is therefore ordered, adjudged and decreed that the defendant pay a fine of $50.

That thereafter and on the 10th day of October, the defendant filed in said court, a

Bill of Exceptions,

as follows:

Be it remembered that on this 26th day of July, 1907, the above-entitled cause came on to be tried before the above-entitled court, the Honorable Thomas A. McBride, circuit judge presiding, upon the complaint and plea of not guilty of the defendant thereto. The State of Oregon appearing by A. M. Crawford, attorney-general, and Gilbert L. Hedges, district attorney, and John C. McCue, deputy, and the defendant in person and by his attorney, G. C. Fulton; and each party being ready for trial, it was stipulated and agreed

in open court by both parties that a jury should be waived and the said cause tried before the court, which was by consent of the court first had and obtained, accordingly done.

9 Thereupon the State of Oregon to sustain the issues on its part, offered and read in evidence a stipulation signed by each party hereto in words and figures following, to-wit:

In the Circuit Court of the State of Oregon for Clatsop County.

STATE OF OREGON
vs.
CHRIST NIELSEN, Defendant.

It is hereby stipulated and agreed by and between the State of Oregon through Gilbert L. Hedges, district attorney, and John McCue, deputy, and A. M. Crawford, attorney-general, of the State of Oregon, representing the State of Oregon in the above-entitled action; and G. C. Fulton, attorney for and representing the defendant in the above-entitled action, that the following shall be and is hereby agreed to be the evidence and facts in the above-entitled action, and the following agreed statement of facts shall be and is hereby agreed to be the evidence and facts upon which the above-entitled action shall be tried and submitted to the above-entitled court; and that the defendant and State of Oregon hereby expressly waive the right of trial by jury and agree that the above-entitled action shall be tried before the court without a jury:

10 First. It is agreed that on the 20th day of July, 1907, and prior thereto, the defendant, Christ Nielsen, was an actual *bona fide* resident and inhabitant of the State of Washington and was and is a citizen of the United States and had resided prior to said date for more than one year, in the State of Washington, and was an actual citizen of the State of Washington.

Second. That prior to said 20th day of July, 1907, the Fish Commissioner of the State of Washington, in pursuance to and under the laws of said state, duly issued and delivered to said defendant a license for a purse-net, in consideration of the fact that said defendant was such citizen as aforesaid and upon the payment to said Fish Commissioner of the sum of $50, said sum being the regular license fee required by the laws of the State of Washington for the operation of purse nets or purse seines on the Columbia River. That said license was issued on the 10th day of April, 1907, for the year 1907 following.

Third. That on the 20th day of July, 1907, the defendant, Christ Nielsen, being then the owner of a certain purse-net or purse-seine for which said license above mentioned was issued under the laws of the State of Washington, placed said purse-net or purse-seine in the waters of the Columbia River, north of the middle of the

11 main ship's channel of the Columbia River opposite the County of Clatsop, State of Oregon, and then and there operated said purse-net or purse-seine for the purpose of catching salmon fish and actually did then and there catch in said purse-net

or purse-seine, a large number of salmon fish on said date and at said place aforesaid.

Fourth. That a purse-net and purse-seine are identical and are floating devises operated by floating the same on the waters, and same was so operated on the waters of the Columbia River at the time and place and date aforesaid, by defendant.

Fifth. It is further stipulated that at the hearing of the trial of the above-entitled action in whatsoever court it may be tried, that all of the laws and statutes of the State of Washington relating to the subject matter of this action and governing the taking and catching of salmon fish and the licensing of appliances therefor in the State of Washington, shall be considered as read in evidence and particularly the laws of the State of Washington in the publication known as Ballinger's Annotated Codes and Statutes of Washington and the various session laws of that state which are generally accepted as the published laws of said state, shall be considered in evidence at all times, all of which may be offered and read at the
12 trial or on appeal in any court, and as to all laws of said state this court and the court on appeal shall take judicial notice and knowledge.

G. C. FULTON,
Attorney for Defendant.
A. M. CRAWFORD,
Attorney-General, State of Oregon.
GILBERT L. HEDGES,
District Attorney,
By JOHN C. McCUE, *Deputy.*

Thereupon the State of Oregon rested.

The defendant through his attorney then offered in evidence the laws of the State of Washington relating to the operation of purse-nets and purse-seines, and particularly the act of the legislative assembly of the State of Washington of March 13, 1899, found on pages 194-5-6-7-8 and 205, as published in the session laws of the State of Washington, session of 1899, compiled in chapters with marginal notes by Will D. Jenkins, Secretary of State. The defendant offered and read in evidence the act of the legislature of the State of Washington of March 11, 1897, found on pages 214-15-16-17-18-19-20, of the session laws of the State of Washington,
13 Session of 1897, compiled in chapters with marginal notes by Will D. Jenkins, Secretary of State.

It was also agreed in open court that not only this court but the court on appeal should take judicial knowledge of all laws and statutes of the State of Washington and could resort to all publications generally accepted as the laws, statutes and session laws of the State of Washington. The defendant then rested, and moved the court to dismiss the action and requested the court to enter a judgment of not guilty. But the court overruled such motion and request, to which ruling of the court the defendant then and there excepted and the exception was allowed by the court to each thereof.

Thereupon the said court adjudged that said defendant was guilty

as charged in the complaint and entered a judgment that defendant pay a fine in the sum of $50.00, which judgment and ruling of the court the defendant then and there excepted and an exception was allowed by the court.

STATE OF OREGON,
County of Clatsop, ss:

I, Thomas A. McBride, Judge of the Circuit Court of the State of Oregon for Clatsop County, hereby certify that the above and
14 foregoing Bill of Exceptions contains all of the testimony and all of the evidence offered and received at the trial of the above-entitled action as well as that offered and offered and received on the part of the state, and that offered and offered and received on behalf of the defendant, also all objections to evidences and rulings thereon and exceptions thereto, and all requests for instructions, and all requests, and motions and rulings therein and exceptions thereto, and the foregoing bill of exceptions is hereby settled and allowed.

Dated this 10th day of October, 1907.

THOMAS A. McBRIDE,
Circuit Judge.

and afterwards and on the 10th day of October, 1907, defendant duly appealed said cause to the Supreme Court of the State of Oregon, by serving and filing with proof of service his notice of appeal, together with a certificate of cause signed by the Honorable Thomas A. McBride, Judge of said Circuit Court.

Assignments of Error.

And appellant says there is manifest error on the face of the record in this:

(1) The court erred in overruling the motion of defendant,
15 made at the close of the evidence on the part of the state, to dismiss the action and discharge the defendant.

(2) The court erred in refusing to dismiss said action and to discharge said defendant.

(3) The court erred in holding and adjudging that the evidence was sufficient to sustain judgment of guilty.

(4) The court erred in overruling defendant's motion to dismiss said action and discharge defendant, and in entering judgment, adjudging the defendant to be guilty of the crime charged, and in entering against him a fine of $50.00.

G. C. FULTON,
Attorney for Appellant.

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17 And afterwards on the 12th day of May 1908, the Supreme Court of the State of Oregon, rendered a decision as follows, to wit:

18 THE STATE OF OREGON, Respondent,
vs.
CHRIST NIELSEN, Appellant.

Appeal from Circuit Court, Clatsop County: Thomas A. McBride, Judge.

Christ Nielsen was convicted of illegal fishing, and he appeals. Affirmed.

G. C. Fulton, for appellant. A. M. Crawford, for respondent.

BEAN, *C. J.:*

The defendant, a resident of the state of Washington, was tried and convicted in the courts of this state, for fishing on the Washington side of the Columbia river, with a purse net—a floating device for taking fish—in violation of the laws of this state, and he appeals. By the law of the state of Washington, in force at the time of his arrest, fishing with a purse net was lawful by those having a license so to do from the fish commissioner of that state, and defendant had such license. The single question for determination, therefore, is whether the law of Oregon prohibiting the taking of fish, in the manner indicated, extends over the entire waters of the river, or whether it is confined to the Oregon side. By section 1 of the Act of Congress of March 2, 1853, c. 90, 10 Stat. 172, all that part of the territory of Oregon lying north of the "main channel of the Columbia river" was organized into the territory of Washington, and by section 21 of the same act it is provided, "that the territory of Oregon, and the territory of Washington, shall have concurrent jurisdiction over all offenses committed on the Columbia river where said river forms the common boundary between said territories." Section 1 of the act of Congress admitting Oregon into the Union (Act Feb. 14, 1859, c. 33, 11 Stat. 383), after describing in detail the boundaries of the state, provides, "including jurisdiction in civil and criminal cases upon the Columbia river and Snake river, concurrently with the states and territories of which those rivers form a boundary in common with this state." And in section 2 it is said "the state of Oregon shall have concurrent

jurisdiction on the Columbia and all other rivers and waters bordering on the said state of Oregon, so far as the same shall form a common boundary to said state, and any other state or states now or hereafter to be formed or bounded by the same."

The meaning of the words "concurrent jurisdiction," as used in these several acts of Congress, is the point at issue in the present case. It has been a subject of dispute between the two states for many years, and is a question of great public importance to both commonwealths, and one which should be authoritatively settled by the Supreme Court of the United States, as the court of final resort. In 1895, one Mattson was tried and convicted in the circuit court of Clatsop county for fishing in the river on Sunday, in violation of the laws of this state. Mattson petitioned the Circuit Court of the United States for a writ of *habeas corpus* and, upon a hearing before Judges Bellinger and Hanford, was discharged, the court ruling that the law of Oregon, under which he was tried and convicted, was invalid, because it had not been acquiesced in or sanctioned by the state of Washington. In construing the word "concurrent," as used in the acts of Congress conferring jurisdiction on the river, it is said, "the word 'concurrent' in its legal and generally accepted definition, means acting in conjunction, and when applied to jurisdiction of Oregon to enact laws for the Columbia river, it can only mean the power to enact such criminal statutes as are agreed to or acquiesced in by the state of Washington, or as are already in force within its jurisdiction." *In re* Mattson (C. C.) 69 Fed. 535. This ruling was subsequently followed by Judge Wolverton in *Ex parte* Desjeiro (C. C.) 152 Fed. 1004. By this construction, concurrent jurisdiction is made to mean the same as joint jurisdiction, consequently neither state can make or enforce any of its laws—civil or criminal—on the river, without the consent of the other, thus denying to each state a jurisdiction expressly conferred upon it by Congress. The question of concurrent jurisdiction over boundary waters has frequently been considered by the courts of this country, and, while no satisfactory definition of the term is to be found in the books, no court, except the one referred to, has, so far as we have been able to ascertain, ever held or intimated that where the waters of a river or stream form the boundary between two states, and each is given concurrent jurisdiction on the same, that neither can enforce its laws unless they have been acquiesced in or approved by the other.

The northern boundary of the states of West Virginia and Kentucky extends to low-water line on the north side of the Ohio river, and the southern boundary of Illinois, Indiana, and Ohio to that point. The middle channel of the Mississippi river is a boundary between the states of Missouri, Iowa and Minnesota, on one side, and Illinois and Wisconsin on the other; and the middle channel of the Missouri river is the boundary between Missouri and Kansas. Each of these states is given concurrent jurisdiction over the river forming the boundary thereof. The right of such states to execute process emanating from its courts and enforce its civil and criminal laws on the waters of the stream has been repeatedly declared, and

is denied by no court of last resort, except in Meyler *v.* Wedding, 107 Ky. 310, 53 S. W. 809, 92 Am. St. Rep. 347, which was subsequently reversed by the Supreme Court of the United States, 192 U. S. 573, 24 Sup. Ct. 322, 48 L. Ed., 570, 66 L. R. A. 833, and Roberts *v.* Fullerton, 117 Wis. 222, 93 N. W. 1111, 65 L. R. A. 953, which will be referred to hereafter. Thus, in State *v.* Plants, 25 W. Va. 119, 52 Am. Rep. 211, a conviction in a West Virginia court for selling spirituous liquor on a boat which was afloat on the Ohio river above low-water mark on the Ohio side, in violation of the laws of West Virginia, was sustained. In Welsh *v.* State, 126 Ind. 71, 25 N. E. 883, 9 L. R. A. 664, it was held that one who sold intoxicating liquors in a boat anchored in the Ohio river south of low-water mark could be charged, tried and convicted in an Indiana court for violating the laws of that state, the court saying, "that the criminal laws of the state extend to and are in force on the Ohio river where such river constitutes the south boundary of the state." In Carlisle and another *v.* The State, 32 Ind. 55, it was held that an Indiana court had jurisdiction over the crime of murder committed on the Ohio river, and in State *v.* George, 60 Minn. 503, 63 N. W. 100, that a court of that state had jurisdiction to punish the crime of larceny committed on the Wisconsin side of the Mississippi river. In Loy *v.* Steamboat F. X. Aubury, 28 Ill. 412, 81 Am. Dec. 292, the court held that trespass would lie for assault committed on a passenger by the officer of a boat on the Ohio river. A conviction for keeping a house of ill fame on the Illinois side of the Mississippi river was sustained by the courts of Iowa (State of Iowa *v.* Mullen, 35 Iowa, 199), and so was a conviction for keeping a gaming house on the Missouri river by the court of that state, although the house or boat in which the gaming was conducted was on the Kansas side (State *v.* Metcalf, 65 Mo. App. 681). In Sanders *v.* St. Louis & N. O. Anchor Line, 97 Mo. 26, 10 S. W. 595, 3 L. R. A. 390, it was ruled that an act of the state of Missouri, giving damages for negligence resulting in death, controlled in a case arising from acts occurring on the Illinois side of the Mississippi river, and the same doctrine has been enforced in the courts of Indiana. Sherlock *v.* Alling, Adm'r, 44 Ind. 184; The Memphis & Cincinnati Packet Co. *v.* Pikey, Adm'x, 142 Ind. 304, 40 N. E. 527. The circuit court of the United States for the district of Oregon, in Annie M. Smull, 2 Sawyer, 223, held that it had jurisdiction over a boat anchored on the Washington side of the Columbia river. Judge Deady, in stating the terms and effect of the act of Congress conferring on this state concurrent jurisdiction on the Columbia river says, "It is not merely a special grant of judicial power to the courts of the state over persons and things upon the river, but within the boundary of the state. It is a legislative declaration or enactment that the jurisdiction of the state—that is, its whole sovereign power shall extend to the whole river, subject to the qualification that the jurisdiction of the state or territory on its northern shore, shall in like manner extend to its southern shore. In effect, this makes the northern shore of the river the northern boundary of the state, for its territorial limits and juris-

19

diction are necessarily the same. Practically, then, so far as the Columbia river forms a boundary common to Oregon and Washington, it is within the territorial limits and jurisdiction of each." The right to exercise concurrent jurisdiction over rivers forming state boundaries will be found discussed by Mr. Rorer in his work on Interstate Law, 336 *et seq.*, and in notes to Roberts *v.* Fullerton, 117 Wis. 222, 93 N. W. 1111, 65 L. R. A. 953. And, as we have already remarked, in no instance has the suggestion been made that the validity of the law sought to be enforced was dependent upon the acquiescence or concurrence of the adjoining state, unless it was concerning some matter affecting or annexed to the soil, but on the contrary in Keator Lumber Co. *et al. v.* The St. Croix Boom Corp., 72 Wis. 62, 38 N. W. 529, 7 Am. St. Rep. 837, it is expressly declared that concurrent jurisdiction is not joint in the sense that only legislative acts adopted by both states can be effective on boundary waters.

The case of Roberts *v.* Fullerton, *supra,* is much relied upon by defendant. That was an action to recover damages for the taking of plaintiff's fish net from where it was located, to catch fish on the Wisconsin side of the Mississippi river. Defendant pleaded in justification that he was an officer of the state of Minnesota duly authorized to enforce its law for preservation of fish, and, in doing the act complained of, was in the performance of his official duties. The court held that, although the states of Wisconsin and Minnesota had concurrent jurisdiction over the water in question, an attempt is made in the majority opinion to distinguish between laws regulating the right to fish and other acts of a criminal and civil nature. But, like Mr. Justice Dodge, who dissented in that case, we are "unable to distinguish between criminal and police legislation of the state addressed to the subject of catching or destroying fish, and police or criminal legislation relating to other subjects." Fish being *feræ naturæ,* while in state of nature, may of common right be captured and taken from navigable waters by any one, unless forbidden by the law giving power. 2 Farnham, Water & Water Rights, 1361. But because an indiscriminate exercise of this common right would speedily result in the destruction of the fish, the sovereignty having jurisdiction over the waters under its police powers may regulate or restrict the exercise of this right for the common good. State *v.* Schuman, 36 Or. 16, 58 Pac. 661, 47 L. R. A. 153, 78 Am. St. Rep. 754; Haggerty *v.* Ice Mfg. & Storage Co., 143 Mo. 238, 44 S. W. 1114, 40 L. R. A. 151, 65 Am. St. Rep. 647; Smith *v.* State, 155 Ind. 611, 58 N. E. 1044, 51 L. R. A. 404. And in our opinion, where adjoining states have concurrent jurisdiction on the waters forming their boundaries, the law of each state regulating the common right to take fish from such waters *are* valid and binding, when not in conflict, and, if there is a conflict, the law of that state, which is the most restrictive in its character, must prevail, and to that extent the state, which first assumes, has jurisdiction to the exclusion of the other. If this is not so, and the states of Oregon and Washington must join in regulations to protect the fish industry on the Columbia river, a thing they have heretofore

been unable to do, the river will practically become a common fishing ground, without limitation or restriction, and one of the greatest industries on the coast be speedily destroyed.

It is argued that Washington, by issuing a license to defendant to fish with a purse net, has made lawful that which the state of Oregon has declared to be an offense, and that a citizen of the former state who has complied with its laws ought not to be punished for violating a law of this state. But the license did not confer upon defendant the right to fish. It was a mere regulation of an existing right, and hence the enforcement of a law of this state prohibiting fishing with certain appliances does not deprive defendant of a right granted to him by an adjoining state, but is an additional limitation and restriction on a common right, and one which, by reason of its jurisdiction over the river, we think it had the power to enact.

20 Be it remembered that at a regular term of the Supreme Court of the State of Oregon, begun and held at the court room in the City of Salem, on the first Monday, the 2d day of March 1908, Present: Hon. Robert S. Bean, Chief Justice, Hon. Frank A. Moore, Associate Justice, Hon. Robert Eakin, Associate Justice, and J. C. Moreland, Clerk, the following proceedings were had on Tuesday the 12th day of May, 1908, the same being the Twenty-first judicial day of said term:

STATE OF OREGON, Respondent,

vs.

CHRIST NIELSEN, Appellant.

Appeal from Clatsop County.

This cause having been, on the 17th day of March, 1908, duly argued and submitted to the Court upon and concerning all the questions arising upon the transcript *and* record herein, and then reserved for further consideration. And the Court having duly considered all the said questions, as well as the suggestions made by counsel in their argument and briefs finds that there is not error as alleged.

It is therefore ordered that the judgment in this cause in the court below rendered be and the same is in all things affirmed.

And it is further ordered by the court that the respondent recover off and from the appellant its costs and disbursements in this court taxed at $—— to be paid in the first instance by Clatsop County.

And it is further ordered that this cause be remanded to the Court below from which this appeal was taken with directions to enter a judgment in accordance herewith.

21 In the Supreme Court of the United States.

CHRIST NIELSEN, Plaintiff in Error,
vs.
STATE OF OREGON, Defendant in Error.

Assignment of Errors.

Comes now the plaintiff in error in the above entitled cause and avers and shows that in the record and proceedings in said cause the Supreme Court of the State of Oregon erred to the grievous injury and wrong of the plaintiff in error herein, and to the prejudice and against the rights of plaintiff in error in the following particulars:

1.

That the Supreme Court erred in affirming the error of the Circuit Court of Clatsop County in overruling the motion of plaintiff in error made at the close of the evidence on the part of defendant in error to dismiss the action and discharge plaintiff in error.

2.

The Supreme Court erred in affirming the lower court in its refusal to dismiss said action and to discharge the plaintiff in error.

3.

The Supreme Court erred in affirming the lower court in holding and adjudging that the evidence was sufficient to sustain a judgment of guilty against plaintiff in error.

4.

The Supreme Court erred in affirming the lower court in its error in overruling plaintiff in error's motion to dismiss said action
22 and discharge defendant, and in entering judgment adjudging the plaintiff in error to be guilty of the crime charged, and in entering against him a fine of Fifty ($50.00) Dollars.

5.

The Supreme Court erred in holding that the State of Oregon had concurrent jurisdiction over the waters of the Columbia River within the territorial limits of the State of Washington.

6.

The Supreme Court erred in finding that plaintiff in error was guilty of a violation of the laws of the State of Oregon.

7.

The Supreme Court erred in holding that the plaintiff in error was not entitled to fish with the waters of the State of Washington,

he having complied with all the requirements of the laws of the State of Washington and then being lawfully engaged in fishing.

G. C. FULTON,
E. C. MACDONALD,
JOHN D. ATKINSON,
Attorneys for Plaintiff in Error.

(Endorsed:) In the Supreme Court of the United States. Christ Nielsen, plaintiff, *vs.* State of Oregon, Defendant. Assignment of errors. Filed Sep. 19, 1908, J. C. Moreland, Clerk.

23 In the Supreme Court of the State of Oregon.

STATE OF OREGON, Respondent,
v.
CHRIST NIELSEN, Appellant.

Petition for Writ of Error.

Comes now the above named appellant and says:

That on the 12th day of May, 1908, judgment was entered by this court against your petitioner affirming the judgment and decree of the Circuit Court of the State of Oregon for Clatsop County, which judgment and decree found your petitioner guilty of unlawfully operating and maintaining within the waters of the State of Oregon, within the County — Clatsop, a certain purse-net or purse-seine for the purpose of catching and taking salmon fish, and imposed a fine of Fifty Dollars thereupon, which said judgment of the Supreme Court became and now is final.

That your petitioner was and is aggrieved in that in said judgment and the proceedings had prior thereto certain errors were committed to his prejudice.

That the defendant was not guilty of an infraction of any laws of the State of Oregon; that he was not engaged in fishing on the day charged in the complaint, to-wit: July 20, 1907, or at any
24 other time, within the waters of the State of Oregon, but that the act of fishing charged in the complaint as being an infraction of the laws of Oregon was in fact committed within the limits of the State of Washington, and said act of fishing was in all respects in compliance with the laws of Washington, lawful and done under and by virtue of a license duly granted by the State of Washington to your petitioner.

That the State of Oregon contends that the law of Oregon prohibiting the taking of fish with a purse-net extends over the entire waters of the Columbia River whether such waters be within the territorial limits of either the State of Washington or the State of Oregon, and contends that the State of Oregon by virtue of the acts of Congress approved March 2, 1853, and February 14, 1859, conferring concurrent jurisdiction upon the State of Oregon over the waters of the Columbia River, authorized and entitled it to prosecute and convict your petitioner for the crime so alleged against him.

That it is the contention of your petitioner that the jurisdiction of the State of Oregon to enact and enforce penal laws for the Columbia River only goes to the extent of enacting and enforcing such criminal statutes as are agreed to or acquiesced in by the State of Washington, or as are already in force within its jurisdiction.

That a federal question is involved herein in that the right set up and claimed by your petitioner was defeated by the construction of such federal statutes in the decision of this court.

That there was drawn in question the construction of said
25 statutes of the United States and the decision of this court was against the right claimed by your petitioner under said statute and as your petitioner verily believes contrary to the said statutes of the United States.

Your petitioner further shows that upon the pleadings and facts in this cause the construction of said statutes of the United States was necessarily involved, and the decision of this Court is against the right claimed by your petitioner thereunder. All of which will more fully appear in detail from the assignment of errors filed herein.

Wherefore, your petitioner prays that a writ of error may issue to the Supreme Court of the State of Oregon for correction of the errors complained of, and that a duly authenticated transcript of the record, proceedings and papers may be sent to the Supreme Court of the United States.

G. C. FULTON,
E. C. MACDONALD,
JOHN D. ATKINSON,
Attorneys for Petitioner.

26 [Endorsed:] (Copy.) No. —. In the Supreme Court of the State of Oregon. State of Oregon, Respondent, *vs.* Christ Nielsen, Appellant. Petition for Writ of Error. Filed Sep. 19, 1908. J. C. Moreland, Clerk.

27 In the Supreme Court of the United States.

CHRIST NIELSEN, Plaintiff in Error,
vs.
THE STATE OF OREGON, Defendant in Error.

Bond on Writ of Error.

Know all men by these presents, That we, Christ Nielsen, as Principal, and National Surety Company, a corporation duly organized under and by virtue of the laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City of New York, duly authorized to act as sole surety in the courts of the State of Oregon and of the United States, as Surety, are held and firmly bound unto the above named State of Oregon in the sum of Five Hundred ($500) Dollars, to be paid to it, to which payment well

and truly to be made we bind ourselves and each of us jointly and severally, and our and each of our heirs, executors, administrators, representatives, successors and assigns firmly and by these presents.

Sealed with our seals and dated the 18 day of September A. D. 1908.

Whereas, the above named plaintiff in error has sued out a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Oregon:

Now therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute said writ of
28 error to effect and answer all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and virtue.

CHRIST NIELSEN, [SEAL.]
By E. C. MACDONALD, *His Attorney.*
NATIONAL SURETY COMPANY,
By S. B. LINTHICUM,
Resident Vice President.

Attest:
By W. L. PAGE,
Resident Assistant Secretary.
[SEAL.]

Approved Sep. 21, 1908.

R. S. BEAN,
Chief Justice.

(Endorsed:) In the Supreme Court of the United States. Christ Nielsen, Plaintiff, *vs.* The State of Oregon, Defendant. Bond on Writ of Error. Filed Sep. 21, 1908. J. C. Moreland, Clerk.

29 In the Supreme Court of the State of Oregon.

STATE OF OREGON, Respondent,
vs.
CHRIST NIELSEN, Appellant.

Order Allowing Writ of Error.

Comes now the appellant herein, Christ Nielsen, on this 19th day of September, A. D. 1908, and files and presents to this court his petition praying for the allowance of a writ of error intended to be urged by him, and praying further that a duly authenticated transcript of the record, proceedings and papers upon which judgment herein was rendered may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had in the premises as may be just and proper.

And upon consideration of said petition this court, desiring to give petitioner an opportunity to test in the Supreme Court of the United States the questions therein presented; it is

Ordered by this court that a writ of error be allowed as prayed.

It is further ordered that before the citation issue herein the said petitioner give bond for costs and damages, according to
30 law, in the sum of Five Hundred ($500) Dollars, which bond shall operate as a supersedeas in this cause.

In testimony whereof, witness my hand and the seal of the Supreme Court of the State of Oregon, this 19th day of September, A. D. 1908.

R. S. BEAN,
Chief Justice of the Supreme Court of the State of Oregon.

31 [Endorsed:] (Copy.) No. —. In the Supreme Court of the State of Oregon. State of Oregon, Plaintiff, *vs.* Christ Nielsen, Defendant. Order Allowing Writ of Errors. Filed Sep. 19, 1908. J. C. Moreland, Clerk.

32 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, To The Honorable the Judges of the Supreme Court of the State of Oregon, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Oregon, before you, or some of you, being the highest court of law or equity of the said State, in which a decision could be had in the said suit between the State of Oregon, plaintiff and defendant in error, and Christ Nielsen, defendant and plaintiff in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute,
33 or commission; a manifest error hath happened to the great damage of the said Christ Nielsen as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 19th day of November next, in the said Supreme Court, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause fur-

ther to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 19th day of September, A. D. 1908.

[Seal United States Circuit Court, Oregon.]

G. H. MARSH,
Clerk of the Circuit Court of the United States for the District of Oregon.

SALEM, OREGON, *September* 21, 1908.

I, A. M. Crawford, attorney of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

A. M. CRAWFORD,
Attorney General, and Attorney for the State of Oregon.

34 [Endorsed:] No. —. In the Supreme Court of the United States. Christ Nielsen, Plaintiff in Error, *vs.* State of Oregon, Defendant in Error. Citation. Filed Sep. 21, 1908. J. C. Moreland, Clerk.

35 In the Supreme Court of the State of Oregon.

STATE OF OREGON,
County of Marion, ss:

I, J. C. Moreland, Clerk of the Supreme Court of the State of Oregon, do hereby certify that the foregoing transcript is a full, true and complete copy of the record of said action certified to and filed with our said court, as the transcript on appeal from the judgment of the Circuit Court of the State of Oregon for the County of Clatsop, from which the said appeal was taken, and is a copy of the Abstract of Record upon which said appeal was heard, and the judgment of our Supreme Court entered thereon on the 12th day of May, 1908.

I further certify that the foregoing transcript likewise contains a full, true, and correct copy of the judgment of our said Supreme Court upon the said appeal entered on the said 12th day of May 1908, and a full, true, and correct copy of the opinion of the court filed May 12th 1908, and upon which said judgment was entered.

I further certify that the foregoing transcript contains a full, true and correct copy of the Plaintiff's Assignment of Errors and Bond on Appeal with the approval endorsed thereon; that the Petition for Writ of Error, Order Allowing Writ of Error and the Citation, with proof of service, all of which are attached to the above and foregoing, are the original Petition for Writ of Error, Order, and Citation lodged with and filed in my office on the 19th of September

1908, except the latter filed on September 21st 1908, and I do certify that the foregoing transcript is a true, and correct copy of the papers and pleadings filed and of the proceedings had in the above entitled cause in our said Court as the same appears of record and on file in my office.

36 I further certify that the cost of the foregoing return to writ of error is $11.25 and that said amount was paid by E. C. McDonald for the plaintiff in error.

In Witness Whereof, I have hereunto set my hand and the seal of the Supreme Court of the State of Oregon, at my office in the City of Salem, in said State, this 3 day of October, 1908.

[Seal Supreme Court, State of Oregon, 1859.]

J. C. MORELAND,
Clerk of the Supreme Court of the State of Oregon.

Endorsed on cover: File No. 21,389. Oregon supreme court. Term No. 593. Christ Nielsen, plaintiff in error, *vs.* The State of Oregon. Filed October 29th, 1908. File No. 21,389.

17

Office Supreme Court, U. S.
FILED.
DEC 2 1908
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 593.

CHRIST NIELSON, PLAINTIFF IN ERROR,

v.

STATE OF OREGON, DEFENDANT IN ERROR.

MOTION TO ADVANCE.

Comes now Christ Nielson, the above-named plaintiff in error, and moves this honorable court to advance the above-entitled case on the docket of this court, and for a hearing of the same at the earliest convenience of the court upon the following grounds:

I.

The above-entitled case involves the question as to whether the State of Oregon has the right to enforce her police powers over all the waters of the Columbia River, from the Oregon shore to the Washington shore, or only to what might be considered the center line thereof.

II.

The decision of the above-entitled case will affect the whole salmon industry of the Columbia River, which amounts to hundreds of dollars annually, and also employs several thousand men.

III.

It being contended by the authorities of the State of Washington that the State of Oregon cannot police the Columbia River as to the fishing industry or pass any laws to govern the same on the river unless the same are concurred in by the State of Washington, several hundreds of fishermen have armed themselves, and declare they will not be arrested for violation of any Oregon statute, and threaten to shoot any officer who attempts any such arrest. In order to allay this feeling and prevent bloodshed, it has been mutually agreed that an injunction should issue, enjoining the enforcement of the Oregon statute until the above-entitled cause is decided by this court, thus leaving the salmon industry and fishing open to any person and in any manner. In other words, the laws regulating fisheries on the Columbia River, passed by the State of Oregon, shall not be enforced until the final decision of this court.

IV.

The legislatures of the respective States of Oregon and Washington convene in January next, and are limited by law to sessions of forty and sixty days, respectively, and that it is important that the questions involved be determined by this court before the adjournment of said legislative bodies in order that they may pass laws in harmony with the decisions of this court before their adjournment; that said legislatures meet bi-annually, and for this reason the importance of an early decision cannot be overestimated.

This motion is based on the records and files in this cause and the consent of the defendant in error on file herein.

E. C. MACDONALD,
Attorney for Plaintiff in Error.

E. C. MACDONALD,
S. H. PILES,
Of Counsel.

Comes now the defendant in error, by A. M. Crawford, its Attorney General, and I. H. Van Winkle, Assistant Attorney General, of counsel for defendant in error, and consents to the motion of the plaintiff in error, and joins therein to have this case advanced on the docket and heard at the earliest convenience of the court.

Dated this 23d day of October, 1908.

A. M. CRAWFORD,
Attorney General,
I. H. VAN WINKLE,
Assistant Attorney General,
Attorneys for Defendant in Error.

A. M. CRAWFORD,
I. H. VAN WINKLE,
HENRY H. GILFRY,
Of Counsel.

Supreme Court, U. S.
FILED
JAN 6 1904
JAMES H. MCKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES

October Term, 1903.

No. 262.

CHRIST SIEGLER,
Plaintiff in Error,

vs.

THE STATE OF OREGON,

In Error to the Supreme Court of the State of Oregon.

BRIEF OF PLAINTIFF IN ERROR.

JOHN D. ATKINSON,
E. C. MACDONALD,
C. C. FULTON,
Solicitors for Plaintiff in Error.

S. H. PILES,
W. P. BELL,
H. M. BROOKS,
J. B. ALEXANDER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

October Term, 1908.

No. 593.

CHRIST NIELSEN,
Plaintiff in Error,
v.
THE STATE OF OREGON,

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On July 20, 1907, a complaint was filed in the Justice Court for the Precinct of Astoria, Clatsop county, Oregon, accusing the plaintiff in error of operating and maintaining a purse-net on the Columbia river on that day, contrary to the statutes of the State of Oregon, and on the same day a warrant was duly issued for his arrest. On July 22, 1907, the plaintiff in error was arraigned before the Justice Court and entered a plea of not guilty. A judgment of conviction was rendered and entered on the same day, and the plaintiff in error was adjudged to pay a fine of $50. An appeal was perfected to the Circuit Court of the State of Oregon for Clatsop county by the plaintiff in error, and on the 26th day of July, 1907, this cause was tried before the Circuit Court and thereafter a judgment was entered sustaining the conviction by the Justice Court. Thereafter, and on October 10, 1907, plaintiff in error appealed this case to the Supreme Court of Oregon, in which court the judgment of

the lower courts was confirmed. From this decision of the Supreme Court, this writ of error is prosecuted.

According to the agreed statement of facts herein on July 20, 1907, and for a year prior thereto, Christ Nielsen was an actual bona fide resident and inhabitant of Washington and a citizen of the United States. A license to operate a purse-net upon the Columbia river within the limits of the State of Washington was duly issued by the Fish Commissioner of Washington on April 10, 1907, for the ensuing year, to Nielsen, and by virtue of license he operated such purse-net and actually caught a large number of salmon fish on the 20th day of July, 1907, therewith. A purse-net is a floating device operated by floating the same on the waters. In this proceeding by express stipulation of all the parties, all the laws of the State of Washington relating to the subject of this action are considered as being in evidence in all the courts where this cause may be heard.

ASSIGNMENT OF ERRORS.

1.

That the Supreme Court erred in affirming the error of the Circuit Court of Clatsop county in overruling the motion of plaintiff in error made at the close of the evidence on the part of defendant in error to dismiss the action and discharge plaintiff in error.

2.

The Supreme Court erred in affirming the lower court in its refusal to dismiss said action and to discharge the plaintiff in error.

3.

The Supreme Court erred in affirming the lower court in holding and adjudging that the evidence was sufficient to sustain a judgment of guilty against plaintiff in error.

4.

The Supreme Court erred in affirming the lower court in its error in overruling plaintiff in error's motion to dismiss said action and discharge defendant, and in entering judgment adjudging the

plaintiff in error to be guilty of the crime charged, and in entering against him a fine of fifty ($50.00) dollars.

5.

The Supreme Court erred in holding that the State of Oregon had concurrent jurisdiction over the waters of the Columbia river within the territorial limits of the State of Washington.

6.

The Supreme Court erred in finding that plaintiff in error was guilty of a violation of the laws of the State of Oregon.

7

The Supreme Court erred in holding that the plaintiff in error was not entitled to fish within the waters of the State of Washington, he having complied with all the requirements of the laws of the State of Washington, and then being lawfully engaged in fishing.

ARGUMENT.

The question involved in this proceeding is the right of sovereignty of the States of Washington and Oregon over the Columbia river where the same forms the common boundary line between the two states.

The pertinent question involved in this case is, what does "concurrent jurisdiction" as used in the enabling acts of the State of Washington and Oregon mean.

The definition of the word "concurrent" as found in Webster's Dictionary is as follows:

"Concurrent.—Adj. 1st. In conjunction, agreeing in the same act or point, contributing to the same event or fact, co-operating.

"2. Conjoined, associated, concomitant, existing or happening at the same time.

"3. Joined or collected in authority taking cognizance of similar questions operating on the same objects.

"4. (Geom.) Meeting in one point."

From the above definition, the common meaning of the word is "in conjunction," and as applied to the term concurrent jurisdiction, would mean that the two sovereignties would have jurisdiction

over common territory when both sovereignties act in conjunction as to the laws concerning the common territory. That is, when the two States of Washington and Oregon pass the same or similar laws which define what shall be a crime if committed on either the Washington or Oregon side of the Columbia river, then they have enacted concurrent legislation, and thereupon the authorities of either state are empowered to enforce its laws by arresting any person who commits a crime on any part of the Columbia river over which the concurrent jurisdiction of the two states lies. Until the two states have passed the same or similar laws, neither state can enforce its laws, at least across its boundary, and act within the territorial limits of another state.

This is the view held by the Circuit Court of the United States for the District of Oregon in the case of *In re Mattson*, 69 Federal Reporter, 535, 542, wherein the court held that

"The word 'concurrent,' when applied to the jurisdiction of Oregon to enact penal laws for the Columbia river, can only mean the power to enact such criminal statutes as are agreed to or acquiesced in by the State of Washington, or as are already in force within its jurisdiction.

"That the States of Oregon and Washington own the bed of the Columbia river upon their respective sides to the middle channel, and the citizens of each within such boundary have a common right of fishing, so long as the navigation of the river is not obstructed. This right is not a mere privilege or immunity of citizenship, but a right of citizenship and property combined, which each state may make exclusive in its citizens, and which is not subject to the control or regulation by the other, unless there is mutual agreement to that end."

The court there further says:

"In the case under consideration, Oregon has established a weekly close season for the Columbia river, and has made fishing in the river during such season a crime; and it undertakes to punish a citizen of Washington for fishing in violation of this restriction in that part of the river within his own state, although by the laws of such state he is permitted to fish on the day interdicted by Oregon. It is no reason for this assumption of legislative control by Oregon within the boundaries of Washington that the latter state has the right to legislate similarly with reference to the river. Washington is precluded, by the legislation of Oregon over the river, from legislating otherwise. What is thus accorded to Washington is not a right, but

the necessity of acquiescence to avoid a conflict of jurisdiction. How can this state, more than Washington, determine the right of the citizens of Washington to fish in the waters of that state, or prescribe the days for such fishing? Washington is wholly foreclosed in the premises by the action of Oregon in determining the question for both states. How can this be called the exercise of a concurrent jurisdiction? The word 'concurrent,' in its legal and generally accepted definition, means acting in conjunction, and when applied to the jurisdiction of Oregon to enact penal laws for the Columbia river it can only mean the power to enact such criminal statutes as are agreed to or acquiesced in by the State of Washington, or as are already in force within its jurisdiction. No comparison can be made between a case like this and cases where the concurrent jurisdiction has been invoked to punish acts that are crimes in themselves, or that are made so by the laws of both states having such jurisdiction. The two states own the bed of the Columbia river upon their respective sides to the middle channel, and the citizens of each within such boundary have a common right of fishing, so long as the navigation of the river is not obstructed. This right is held by the Supreme Court of the United States to be, not a mere privilege or immunity of citizenship, but a right of citizenship and property combined, which the state may make exclusive in its own citizens. *McCready v. Virginia*, 94 U. S. 391. It is clear, therefore, that this right in each state is not subject to control or regulation by the other, unless there is mutual agreement to that end. It can no more be brought within such control than can the enjoyment of property rights on the dry land."

In the same court in the case of *Ex parte Des Jeiro*, 152 Federal Reporter, 1004, the court entertained the same view and upheld its former decision. Judge Wolverton, in delivering the opinion of the court, says:

"Under their respective constitutions and the acts of Congress admitting them into the Union the States of Oregon and Washington, although their common boundary is the middle channel of the Columbia river, are each accorded and have concurrent jurisdiction over the entire river. *In re Mattson* (C. C.) 69 Fed. 535. And the vital and pivoted question involved is whether the statute under which the petitioners were convicted is invalid and inoperative by reason of nonconcurrence therein by the Legislature of the State of Washington. Almost the identical question was decided in the case just cited. There the defendant, an inhabitant of the State of Washington, was arrested and imprisoned for fishing on Sunday, an act of the Legislative Assembly of the State of Oregon inhibiting the conduct (Session Laws, Oregon, 1891, p. 33), which was a general law applying to all the waters of the state. It was insisted

that as the Legislature of the State of Washington had not concurred in the enactment, or had not a similar statute of its own, the act was void, and insufficient by which to constitute the offense. In his determination of the cause Judge Bellinger says:

"'It is no reason for this assumption of legislative control by Oregon within the boundaries of Washington that the latter state has the right to legislate similarly with reference to the river. Washington is precluded, by the legislation of Oregon over the river, from legislating otherwise. What is thus accorded to Washington is not a right, but the necessity of acquiescence to avoid a conflict of jurisdiction. How can this state, more than Washington, determine the right of the citizens of Washington to fish in the waters of that state, or prescribe the days for such fishing? Washington is wholly foreclosed in the premises by the action of Oregon in determining the question for both states. How can this be called the exercise of concurrent jurisdiction? The word "concurrent," in its legal and generally accepted definition, means acting in conjunction, and, when applied to the jurisdiction of Oregon to enact penal laws for the Columbia river, it can only mean the power to enact such criminal statutes as are agreed to or acquiesced in by the State of Washington, or as are already in force within its jurisdiction.'

"The opinion was concurred in by Judge Hanford of the District of Washington.

"True, in that case a citizen of Washington was the defendant, but it does not seem to me that that fact can make any difference. The law, as appears from a reading of the act, was general in its operation, as it is here, and designed to apply alike to all parts of the state, and concurrently with Washington over the waters of the Columbia river. If the act was void, as it respects a citizen of the State of Washington being general, it is void as to every other citizen, whether of the State of Washington or California, or elsewhere. It is the act of concurrence between the two states, in the exercise of legislative authority, that validates the act and gives it the force of law, and, unless there is a concurrence or assent by both states to the enactment, it cannot have that force. This is the doctrine of the Mattson case, and it has direct applicaion to the case a bar.

"Now, Section 4092, as amended, makes it a misdemeanor for any person not a resident of the state for the period of six months preceding to take or fish for salmon fish in any of the waters of the state. This is a specific offense within itself. An examination of the laws of the State of Washington will disclose the fact that there is no such offense established within that state, and hence there is not concurrence in the laws of the two states as to the offense. In each state, however, it is required that parties desiring to fish with gill nets shall take out a license, and in each a violation of any of the provisions touching the occupation of fishing within the waters thereof

is made a misdemeanor; so that it may be said, perhaps, that the states have legislated concurrently upon that subject. By the Washington act a person must be a resident of the state for one year next preceding before a license can be issued to him; in Oregon the time is fixed at six months; but this is a matter of minor importance and it may be said that the laws in that regard are in all material respects concurrent. But it is not the offense of fishing without a license that is complained against. It is the offense of fishing without being a resident of the state; and, the State of Washington not having concurred in this legislation, the act is void as to all persons, whether they be citizens of Washington or California, and is within the doctrine of the Mattson case."

In the case at bar, it will be noticed from the stipulation agreed to that the plaintiff in error was a bona fide resident of the State of Washington, and had complied with the statutes of the State of Washington in regard to fishing on the Columbia river with purse-nets. It will be further noticed that the State of Oregon has passed a penal statute prohibiting fishing with purse-nets on the Columbia river, while the State of Washigtnon has passed a law allowing fishing with purse-nets on the Columbia river upon the payment of a certain license fee. The two states, instead of passing the same or similar laws, have passed laws diametrically opposed to each other.

As early as 1897 the Legislature of the State of Washington, by the act of March 10, 1897 (Session Laws of Washington, 1897, p. 214), specially authorized the employment of purse seines in the waters of the Columbia river for the purpose of catching salmon fish. (Section 3 of the above act.) In 1899 the above act was amended by the act of March 13, 1899 (Session Laws, Washington, 1899, p. 194.)

Section 2 of the above act specially authorizes the employment of purse nets for the purpose of catching salmon fish in the waters of the Columbia river. The portion of the act necessary for a clear understanding reads as follows:

"Section 2. The use of the pound nets, traps, weirs, fish wheels and other fixed appliences, and *purse nets*, drag seines, and other seines for catching salmon, is hereby authorized in all the waters of this state wherein the same is not prohibited by Section 1, subject

to the regulation and license hereinafter provided for or otherwise required by law, and the use of the set nets, gill or drift nets, subject to state license and regulation for said purpose, is authorized in all the waters of this state except as otherwise provided by law. * * *"

The prohibition in Section 1 referred to does not include the Columbia river. Section 6 of the same act fixes the license fee for all first-class purse seines at $50, and all second-class purse seines at $25.

It was under the provisions of the above act that the plaintiff in error acquired his license and was operating his purse-net or seine when he was seized by the officials of the State of Oregon and taken before the courts of Oregon and subsequently convicted for doing the very act which the laws of his domicile authorized him to do, and which the officials of that state lawfully licensed him to do.

In the face of the above legislation, the Legislative Assembly of the State of Oregon, at its last session, enacted the following legislation (Session Laws, Oregon, 1907, p. 154):

"Section 1. It shall hereafter be unlawful to operate or maintain within any of the rivers of this state or of the Columbia river or in the Pacific ocean within three miles of the mouths of any of the rivers of this state, or of the Columbia river, any purse-net or other like seine for the purpose of catching or taking salmon or other anadromous fish or sturgeon.

"Section 2. Any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than $50.00, nor more than $1,000.00 and costs, for each and every offense, and in addition thereto shall forfeit the purse-net or other like seine or device or devices so unlawfully used."

Though these state enactments are opposed to each other, yet the statutes at large grant to Washington and Oregon concurrent jurisdiction.

Section 1, page 179, Chapter XC., 10 Statutes at Large, establishing the territorial government of Washington, provides:

"The Territory of Oregon and the Territory of Washington shall have concurrent jurisdiction over all offenses committed on the Columbia river, where said river forms a common boundary between said territories."

Section 1, page 383, Vol. 11, Statutes at Large (the act admitting Oregon into the Union), after describing in detail the boundaries of the state, provides:

"Including jurisdiction of civil and criminal cases upon the Columiba river and the Snake river, concurrently with states and territories of which those rivers form a boundary in common with this state."

Section 2 provides:

"The said State of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said State of Oregon so far as the same shall form a common boundary to said state, and any other state or states now or hereafter to be formed or bounded by the same."

The Supreme Court of Wisconsin, in the case of *Roberts v. Fullerton*, 117 Wis. 222 (93 N. W. Reporter, 111?), before whom a state of facts arose similar in every way to those involved herein, discussed similar acts of Congress and arrived at the same conclusion, though by a different process of reasoning. In this case Justice Marshall carefully reviews all the cases bearing on the subject and concludes that the exact question had never been decided by any court, up to that time. He then proceeds as follows:

"Tested by the principle above adopted, do the mere police regulations of one country regarding the exercise of the common right of fishing extend into the territory of a foreign jurisdiction, the two being separated by an imperceptible boundary line in a river or lake?

"Is the common right of fishing which belongs to the people of this state within all that part of its territory on the easterly side of the main channel of the Mississippi river subject to the laws of the State of Minnesota? There is no escaping the conclusion that if such is the case it is competent for that state to extend its police regulations as regards fishing and hunting over a large part of the waters of Lake Superior on the Wisconsin side, reaching up to the shore line, and for the State of Michigan to extend its laws on Lake Michigan on the same subject to the Wisconsin shore. We have searched in vain to find authority to sustain the affirmative of the proposition suggested. In no instance recorded in the books has one country been held entitled to exercise jurisdiction to regulate the common right of fishing in the territory of a foreign state under the measure of concurrent jurisdiction commonly exercised by the two on the waters divided by their boundary line. We venture to say that such concurrent jurisdiction has never been successfully

invoked to justify interference by one state or country with the enjoyment of the right to fish within the territorial boundaries of another. It would be foreign to the necessities of this case to enter into a discussion regarding the limits of that jurisdiction. It is sufficient for this case that we have reached the conclusion that, while it refers to acts of criminal or civil nature on the water, or acts in some way connected with the use of the water for navigable purposes, it does not extend to the right of one state by legislative enactment to govern the fishery rights of the people in a foreign jurisdiction. As we have before seen, this country and the British provinces exercise concurrent jurisdiction over the waters divided by their boundary line, and the same is true as to this country and Mexico. No one would venture to say that one country could enforce its laws for the preservation of fish or regulating the taking of fish within the territorial limits of the other. It is to be regretted that the nature of the authority on the waters of he Mississippi exercisable by Wisconsin and Minnesota has not been heretofore definitely decided. No court has yet dealt with the subject, or the meaning of the language requiring construction in similar situations, so as to cover the whole thereof satisfactorily, if at all. Many judges have deplored the uncertainty existing, but have found a convenient way of escaping the labor of removing it. The interests at stake are so great that it is not to be wondered that any one appreciating the same should hesitate long before entering upon the difficult task of solving completely the troublesome question suggested. There is a concensus of opinion that concurrent jurisdiction does not mean concurrent dominion, and that it refers only to things afloat, or on the water in some reasonable view of the situation, or so circumstanced as to be legitimately regarded as connected with the use of the water for navigable purposes. That is about as far as the courts have gone. * * * It is our opinion that the term refers to that authority commonly exercised concurrently upon water divided by the boundary line between two countries, according to the public law as recognized in this country at the time the use of the term became common in our legislative history; that it relates to matter at least in some way connected with the use of water for navigable purposes, to things afloat, or in some legitimate sense on the water—things difficult to deal with if it were necessary to determine in each instance of the exercise of jurisdiction the precise location of the particular act involved as regards the boundary line; *but that it does not include the right to regulate the enjoyment by the people of one state within its domain, of rights incident to their situation, such as the right to navigate or fish.* It does not empower one state to spread its mere police regulations over territory of another, regulating the sovereign property right of the latter in or to the water flowing over such territory, or to the fish therein, or to fowls therein, which it holds in trust for the enjoyment of

the whole people within its boundaries, in their individual capacities, under such legal restraint as such other, in its legislative wisdom, may see fit to impose—so long as such enjoyment does not interfere unlawfully with like enjoyment by the people of the state on the opposite side of the boundary."

See also *Central R. R. Co. of New Jersey v. Jersey City (N. J.)* 56 Atlantic Reporter, 239.

Concurernt jurisdiction cannot be held to be exclusive jurisdiction. It is inconceivable that the State of Oregon and the State of Washington should each have exclusive jurisdiction and sovereignty over the same territory at one and the same time. The best illustration of the anamoly of such a condition of affairs is shown by the position in which the defendant in this action finds himself.

By the laws of his state he is authorized to operate upon the waters of the Columbia river, a purse-net for the purpose of catching salmon fish. At the time he was arrested by the Oregon authorities, a law of the State of Washington, which had been in existence for more than ten years, authorized the operation of such devices. The defendant was concededly within the territorial limits of his state, and was in the performance of an act made lawful by the statutes thereof. Not only that, but his state had granted to him, pursuant to legislative enactment, a license authorizing him to operate such purse-net, for which privilege he had paid the State of Washington $50.00. He was never in the State of Oregon, but he finds that he has been complained of, tried, convicted and imprisoned for violating a law of the State of Oregon, which the State of Oregon seeks to justify under the act of Congress granting to Washington and Oregon concurrent jurisdiction over the waters of the Columbia river. He is told that "concurrent jurisdiction" means exclusive jurisdiction in Oregon. In vain, he pleads that he is a citizen of Washington; that the acts charged against him were all committed within the territorial boundaries of Washington. That he was doing that which the laws of his state specially permitted, authorized, and licensed him to do. In vain, he points out that the jurisdiction of Oregon is only "concurrent" with the State of Washington; he is

answered that "concurrent" means exclusive jurisdiction in Oregon; that "concurrent jurisdiction" does not mean concurrent, but means exclusive, and that each state has absolute sovereignty over the entire waters of the Columbia river where it forms a common boundary between them, at one and the same time.

A curious condition of affairs might arise if the State of Washington should pass an act making it unlawful to arrest any person for operating a purse-net on the Columbia river where the operator had a license issued to him by the Fish Commissioner of the State of Washington. *In re Oberg*, 21 Or. 406. We will assume that such an act should be passed, and that the Master Fish Warden of the State of Oregon, acting under the laws of his state, should arrest a resident of the State of Washington found operating a purse-net upon such waters, say north of the boundary, and that such party had a license regularly issued to him by the Fish Commissioner of the State of Washington authorizing him to operate such pures-net. The fisherman could offer no defense, and would be promptly fined and imprisoned. The officers of the State of Washington would then lodge a complaint against the Master Fish Warden of the State of Oregon; he would be brought before the courts of Washington and promptly convicted of doing the very act which the laws of the State of Oregon required him to do. He would be sent to jail. We would have then, in Oregon, a citizen of Washington imprisoned for the doing of an act in the State of Washington, which by the laws of such state was made legal. We would have the Master Fish Warden of the State of Oregon confined in the jail in the State of Washington for performing his duty and enforcing the laws of the State of Oregon.

This court in the case of *McCready v. Virginia*, 94 U. S. 391, 394, has announced the now well settled principle:

"That each state owns the beds of all tide-waters within its jurisdiction, unless they have been granted away. *Pollard's Lessee v. Hagan*, 3 How. 212; *Smith v. Maryland*, 18 How. 74; *Mumford v. Wardwell*, 6 Wall. 436; *Weber v. Harbor Commissioners*, 18 id. 66. In like manner, the states own the tidewaters themselves, and the fish in them, so far as they are capable of ownership while running. For this

purpose the state represents its people, and the ownership is that of the people in their united sovereignty. *Martin v. Waddell*, 16 Pet. 410. The title thus held is subject to the paramount right of navigation the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the state, which has consequently the right, in its discretion, to appropriate its tide-waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. The right which the people of the state thus acquire comes not from their citizenship alone, but from their citizenship and property combined. It is, in fact, a property right, and not a mere privilege or immunity of citizenship."

As applied to fishing in the Columbia river, where the same forms the common boundary between the two states, it means that each state has exclusive jurisdiction within its territorial limits over the fishery question, and the power to regulate the same and to enact a penalty for any infractions thereof. The exclusive jurisdiction then being in the State of Washington to regulate the fishery question, the State of Oregon cannot pass any statute regulating the fishery question, within the territorial limits of the State of Washington. So, too, the State of Washington has exclusive jurisdiction within its territorial limits over all permanent structures attached to the river bed. *Wedding v. Mayler*, 192 U. S. 573, 585.

From the above discussion, we adduce the following:

That the States of Washington and Oregon, each in its sovereign right, own the bed of the Columbia river up to the boundary line where such river forms the common boundary between them, and each has in its territorial limits, exclusive sovereignty over all permanent structures attached to the river bed, the fish therein, and the power to regulate the taking of such fish.

That concurrent jurisdiction means that where both states have passed the same or similar laws in relation to civil and criminal matters, then either state may enforce its laws over its boundary where the river forms the common boundary; that until each state has passed the

same or similar laws, neither state can enforce its laws outside of its own territorial limits.

We respectfully submit that the judgment of the Supreme Court of Oregon should be reversed and the plaintiff in error discharged.

JOHN D. ATKINSON,
E. C. MACDONALD,
G. C. FULTON,
Solicitors for Plaintiff in Error.

S. H. PILES,
W. P. BELL,
H. M. BROOKS,
of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1908

CHRIST NIELSEN, *Plaintiff in Error,*

v.

STATE OF OREGON, *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR

Error to the Supreme Court of the State of Oregon

A. M. CRAWFORD, ATTORNEY-GENERAL,
I. H. VAN WINKLE, ASSISTANT ATTORNEY-GENERAL,
Solici' for Defendant in Error.

STATEMENT OF CASE.

July 20, 1907, a complaint was filed in the justice's court for the precinct of Astoria, Clatsop County, Oregon, charging the above-named plain-

tiff in error with operating a purse seine in the waters of the Columbia River, contrary to the statutes of the State of Oregon.

On the 22nd day of July, 1907, defendant pleaded not guilty to the complaint, and was duly tried before the justice of the peace, found guilty, and adjudged to pay a fine of $50.

Defendant appealed to the Circuit Court of the State of Oregon for Clatsop County, and on the 17th day of August, 1907, the said plaintiff in error was again found guilty and by said circuit court adjudged to pay a fine of $50.

The plaintiff in error appealed from said judgment of the circuit court to the Supreme Court of the State of Oregon, and assigned as error committed by the circuit court the following:

(1) The court erred in overruling the motion of defendant, made at the close of the evidence on the part of the State, to dismiss the action and discharge the defendant.

(2) The court erred in refusing to dismiss said action and to discharge said defendant.

(3) The court erred in holding and adjudging that the evidence was sufficient to sustain a judgment of guilty.

(4) The court erred in overruling defendant's motion to dismiss said action and discharge defendant, and in entering judgment, adjudging the defendant to be guilty of the crime charged, and in entering against him a fine of $50.

On March 17, 1908, the case was duly argued before the Supreme Court of the State of Oregon, and on May 12, 1908, the said court entered a

judgment affirming the judgment of the Circuit Court for Clatsop County, and adjudging costs of the appeal against the defendant.

Thereupon, the plaintiff in error brought the cause to this court.

STATEMENT OF FACTS.

The facts of the case (see record, page 4) essential to the question to be decided by this court can be briefly stated as follows:

I.

That plaintiff in error was, at all the times mentioned, and still is a resident of the State of Washington, and licensed by the Commissioner of Washington to fish in the waters of the Columbia River with a purse net or purse seine.

II.

That the crime for which he was arrested and convicted, as aforesaid, was for operating and maintaining within the county of Clatsop, Oregon, a certain purse net or purse seine for the purpose of catching and taking salmon fish, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Oregon, and was committed on the 20th of July, 1907, to-wit: on the Washington side of the main ship channel of the Columbia River.

III.

That the laws of Washington do not prohibit such fishing, while the laws of Oregon forbid the same and prescribe a penalty therefor.

QUESTION FOR DECISION.

It is contended by the plaintiff in error that the State of Oregon cannot enforce her civil or criminal laws over the waters of the Columbia River on the Washington side of the main channel thereof, unless the States of Washington and Oregon have each enacted the same laws relative to the particular matter. In other words, that the words "concurrent jurisdiction," as used in the act admitting Oregon into the Union, mean "joint or concurrent legislation."

The defendant in error contends that each State has the right to enforce her criminal laws over the whole of the stream and to regulate navigation and commerce thereon, including the time and manner of fishing therein, subject only to powers relative thereto delegated to the Federal Government by the Constitution of the United States.

POINTS AND AUTHORITIES.

I.

Jurisdiction unqualified, when applied to territory, is the sovereign authority to make, decide on, and execute laws.

Wedding *v.* Meyler, 192 U. S. 573, 584, 585, approving Arnold and Parish *v.* Shields, 5 Dana (Ky.) 23.

Daniels *v.* Tearney, 102 U. S. 415, 418, holding jurisdiction is only "The right to hear and determine." Also same is held in

Grignon's Lessee *v.* Astor, 2 How. (U. S.) 318, 337, and in

Cornett *v.* Williams, 20 Wall. (U. S.) 226, 249.

Brown on Jurisdiction, 2 Ed., Sec. 2.

11 Cyc., p. 659.

Rawles Revision Bouvier's Law Dictionary, Vol. 2, page 57.

Anderson's Dictionary of Law, page 580.

Abbott's Law Dictionary, Vol. 1, page 671.

When a State or any sovereign power acquires jurisdiction over any territory, and that without conditions or limitations, the sovereign is vested with the authority to make, interpret, and execute the laws for that territory.

In the case of Wedding *v.* Meyler, above cited, the court adopts and approves the definition of the word "jurisdiction," as set forth in Arnold and Parish *v.* Shields, 5 Dana 23, holding "jurisdiction unqualified" to be the sovereign authority to make, decide on, and execute laws.

Bouvier, page 57, says

"Jurisdiction is the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: first, the court must have cognizance of the class of cases to which the one to be adjudicated belongs; second, the proper parties must be present; and, third, the point decided upon must be in substance and effect within the issue, and that general jurisdiction is that which extends to a great variety of matters. General jurisdiction in law and equity is jurisdiction of every kind that a court can possess of the person, subject-matter, territorial, and generally the power of the court in the discharge of its judicial duties."

And Anderson, in his law dictionary, defines "jurisdiction," "as governmental authority"; and, second, "power to hear and determine a cause, that is,

the subject-matter in controversy between parties to a suit to adjudicate or exercise any judicial power over them."

And in Abbott's Law Dictionary, page 671, we find "jurisdiction" to be "the authority of government, the sway of sovereign power," and we find many decisions in accordance with the tenor of the above definitions, other than those cited, but deem it unnecessary to cite them in this matter, as "jurisdiction" in the abstract is well understood by the judiciary of the country, and has frequently been defined by this court. However, we respectfully call attention to State of Rhode Island *v.* Massachusetts, 37 U. S. 657, 718, in which case a general discussion of jurisdiction is found, and in which it is held "jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them."

II.

The words "concurrent jurisdiction," as used in the act admitting Oregon into the Union means like authority conferred on each sovereign at the same time, over the same place, object, or thing, including the authority to enforce its commands or decrees over the same.

Secs. 1 and 2, act admitting Oregon, 11 U. S. Stat. 383; 1 Vol. B. & C. Codes, 73.

In re The Annie M. Smull, 2 Sawyer (9 U. S. Circuit) 226; 1st Federal Cases, Case No. 423. (1872.)

Carlisle and another *v.* State, 32 Ind. 55, 56.

Sherlock *et al. v.* Alling, Admr., 44 Ind. 184, 193.

The State of Iowa *v.* Mullen, 35 Iowa, 199, 201, 204.

State of Minnesota *v.* Alexander George, 60 Minn. 503, 505; 63 N. W. 600.

Wedding *v.* Meyler, 192 U. S. 573, 581 *et seq.*; 24 S. C. Rep. 322.

Ohio *v.* Stevens and Everett, 2 Western Law Journal, 66. This case was reversed by the Supreme Court of Ohio, 4th Ohio, 386, but on another point.

Arnold and Parish *v.* Shields, 5 Dana (Ky.) 20, 23.

McFall *v.* Commonwealth, 2 Metcalf (Ky.) 394, 396.

The Memphis & Cincinnati Packet Co. *v.* Pikey, Admr., 142 Ind. 305, 308.

Welsh *v.* State, 126 Ind. 71, 74, 75.

Rorer on Interstate Law, Chap. 34, Sub. 3, page 337.

Rawles' Revision Bouvier's Law Dict., Vol. 2, page 57.

The principal question to be determined in the case at bar is what power or authority was conferred upon the State of Oregon over the waters of the Columbia River by the act admitting Oregon into the Union, found in 11 U. S. Statutes, page 383, and by sections 1 and 2 thereof, which provide as follows:

Section 1, after defining the boundaries of the State, reads:

"Including jurisdiction in civil and criminal cases on the Columbia River and Snake River, concurrently with States and Territories of which those rivers form a boundary in common with this State."

And section 2 provides:

"The said State of Oregon shall have concurrent jurisdiction on the Columbia and other rivers and waters bordering on the said State of Oregon, so far as the same form a common boundary to said State, and any other State or States now or hereafter to be formed or bounded by the same. The said rivers and waters, and all the navigable waters of said State shall be common highways, and forever free, as well to the inhabitants of said State, as to all other citizens of the United States, without any tax, duty, impost, or toll therefor."

The first judicial construction of these sections was by Judge Deady in the District Court of the United States for the District of Oregon, in the case of the Annie M. Smull, reported in 2 Sawyer 226, in which case the court held that the District Court for the District of Oregon has concurrent jurisdiction with the Washington territorial courts on the Columbia River to the Washington shore. This was a case where a vessel was libeled for seamen's wages while she was fast to the Washington shore, and it was claimed on behalf of the vessel that she was not within the jurisdiction of Oregon, but lying in the Columbia River off Kalama in Washington Territory. After reciting the act admitting Oregon as a State, and the act of March 13, 1849, establishing Oregon as a judicial district, the court held, page 228:

"As the law stands, it is admitted that the boundary of the State and district are identical. It is also clear that Congress had the power to give this court jurisdiction, either concurrent or exclusive, over the whole river, of matters within the judicial power of the United States, and that the public convenience requires that it should have it. The only question then to be considered is, has Congress done so? In my judgment it has. The argument of counsel for the exception, does not correctly state the terms or effect of the clause concerning the concurrent jurisdiction of the State. It is not merely a

special grant of judicial power to the courts of the State over persons and things upon the river, but without the boundary of the State. It is a legislative declaration or enactment that the jurisdiction of the State—that is, its whole sovereign power, shall extend to the whole river, subject to the qualification that the jurisdiction of the State or Territory on its northern shore shall in like manner extend to its southern shore. In effect, this makes the northern shore of the river the northern boundary of the State, for its territorial limits and jurisdiction are necessarily the same. Practically, then, so far as the Columbia River forms a boundary common to Oregon and Washington, it is within the territorial limits and jurisdiction of each. In the language of the act of February 14, 1859, aforesaid, it is the common property and 'highway' of both. This being so, the river is also within the jurisdiction of the District of Oregon, and therefore this court has jurisdiction of this suit.

"What is here said upon this subject is, however, only intended to apply to jurisdiction over matters and things actually arising or situate upon the river. The concurrent jurisdiction is not understood to extend over any island, or dry land within the river. As to such, and probably only such, the middle thread of the river is the absolute boundary line of both State and district.

"It is also stated in this exception, that the vessel was 'moored at the wharf at Kalama,' a town on the Washington Territory shore, and some reference was made to this fact in the argument. But I do not perceive on what ground it can be claimed that a vessel which is in fact floating or lying upon or in the river, is to be considered as without the district, because it may be fastened or moored to the northern shore of the river, or to any wharf or other structure erected thereon."

The case of Carlyle *v.* State, 32 Indiana 55, was an indictment for murder, charging it to have been committed "at and in the said county of Spencer," and the evidence showed the crime to have been committed on the Ohio River opposite the said county, below low-water mark, and the court held the variance immaterial, saying, on page 56:

"By the act of the commonwealth of Virginia, entitled 'an act concerning the erection of the district of Kentucky into an independent State,' passed December 18, 1789, it is provided, 'that the use and navigation of the river Ohio, so far as the territory of the proposed State or the territory which shall remain within the limits of this commonwealth lies therein, shall be free and common to the citizens of the United States; and the respective jurisdiction of this commonwealth, and of the proposed State, on the river as aforesaid, shall be concurrent only with the States which may possess the opposite shore of said river.' Revised Laws of Virginia, Vol. 1, p. 59.

"Indiana has asserted this concurrent jurisdiction in her constitution. Article 14, section 2.

"By the act of June 7, 1852, dividing the State into counties, it is provided, 'that the proper courts of the several counties in this State bordering on the Ohio River * * * shall have jurisdiction of all offenses committed against the penal laws of this State on said river, opposite to said counties respectively.' 1 G. & H. 190, § 93.

"By force of these provisions, the court of the county of Spencer has concurrent jurisdiction with the courts of Kentucky over crimes committed on the Ohio River."

The Supreme Court of the State of Iowa, in State *v.* Mullen, 35 Iowa 199, cited, held that Iowa has jurisdiction of offenses committed anywhere on the waters of the Mississippi River, although committed beyond the "*medium filum aqua*," and near to the lands of a coterminous State. This is plainly on the ground that Congress gave concurrent jurisdiction and on no other ground whatever, the court using the following language at page 201:

"The act of Congress for the admission of the State of Iowa into the Union contains the following provision: 'that the State of Iowa shall have concurrent jurisdiction on the river Mississippi, and every other river bordering on the said State of Iowa, so far as the said rivers shall form a common boundary to said State and any other State or States now or hereafter to be formed, bounded by the same. * * *' Revision page 965; 5 United

States Stat. at Large, 742. Commenting upon this statute, this court, in Gilbert *v.* Moline Water-Power and Manufacturing Co., said: 'Injuries are inflicted upon persons and property, by persons while on the river, for which they should be held answerable, criminally as well as civilly. If jurisdiction in all such cases was made to depend on the inquiry, whether the boat or vessel was on the one side or the other of the main channel; whether the injury was inflicted or crime committed east or west, or north or south of such line, it can be readily seen that it would be frequently almost impossible to determine such jurisdiction, and that a mistake in this respect would prove fatal to the action or prosecution. And hence the reason of making the jurisdiction concurrent in all such cases.' 19 Iowa 319.

"Pursuant to this act of Congress, the Revision, chapter 1, section 3, provides that: 'The State has concurrent jurisdiction on the waters of any river or lake which forms a common boundary between this and any other State.' Under this legislation it must, we think, be conceded that the State of Iowa has jurisdiction to punish a crime committed on the Mississippi River, opposite its eastern boundary and east of the middle of the main channel. The question which arises under this instruction is: Does this jurisdiction exist under the facts therein stated? In other words, does the fact that the boat at the time of indictment and of trial was on the east side of the main channel of the river, resting temporarily in the rear of the island, because the water had receded from it, or for repairs, take it out of the jurisdiction of this State? It seems to us clearly that it does not. In the eye of the law a crime committed on the boat under the circumstances stated, is as much an offense perpetrated *on the river*, as though the vessel were at the time afloat. If it is not so it follows that if a vessel navigating the Mississippi River should run aground east of the middle of the main channel, and the water should recede, leaving it upon the ground temporarily, the State of Iowa would have no jurisdiction over a crime committed upon it under such circumstances, and hence would arise the question so difficult of determination, and which it was the purpose of the act of Congress above cited to avoid, whether the act in question was committed one foot east or one foot west of the *medium filum aquae*."

The case of the State of Minnesota *v.* Alexander George, 60 Minn. 503, was an indictment for larceny. The facts as stated in the syllabus are as follows: The offense of larceny from the person was committed above an island on a wagon bridge which crosses the Mississippi River between Wisconsin and Minnesota. The island is on the Wisconsin side of the main channel of the river, is separated from the Wisconsin shore by non-navigable water, is subject to overflow, is submerged about four months in the year, is crossed by said bridge, which rises above high-water mark, is a permanent structure and is supported by piles driven in the soil of the island. *Held*, the State of Minnesota has jurisdiction over said offense. And it was so held by virtue of concurrent jurisdiction. Section 2 of the enabling act of Minnesota reads as follows:

"And be it further enacted that the said State of Minnesota shall have concurrent jurisdiction on the Mississippi and all other rivers and waters bordering on the said State of Minnesota, so far as the same shall form a common boundary to said State and any other State or States now or hereafter to be formed or bounded by the same."

The court in said case held, page 505:

"Some of the purposes of this concurrent jurisdiction are to enforce proper police regulations on the river, and to regulate and protect interstate traffic on and across the river, and the persons engaged in the same. If public travel across the river at this point was carried on by means of a ferry-boat, there is no question but that this concurrent jurisdiction would attach during the transit across the river. The fact that the appliance by means of which the travel is carried on is a bridge instead of a ferry-boat does not change the rule. The question here involved is not whether the courts of Minnesota have jurisdiction over this permanent structure on this island considered as real estate, but whether Minnesota and her courts have jurisdiction over the persons and moving or

movable vehicles and things on this bridge. In our opinion, it is not material whether, at the time of the occurence, such persons happen to be over the water of the river, or over an island in the river, or at one side of the main channel or the other. One of the reasons for establishing this concurrent jurisdiction was to prevent the escape of criminals on account of the uncertainty that so frequently arises as to whether the act is committed on a bridge as when committed on a water craft. A traveler on such a bridge is usually not likely to know whether he is over an island or over the water, or on one side of the main channel or the other. In our opinion, the court below had jurisdiction."

And in Wedding *v.* Meyler, 192 U. S. 573, cited, the court says, at page 584:

"Concurrent jurisdiction, properly so-called, on rivers, is familar to our legislation, and means the jurisdiction of two powers over one and the same place. There is no reason to give an unusual meaning to the phrase. See Sanders *v.* St. Louis & New Orleans Anchor Line, 97 Missouri, 26, 30; Opsahl *v.* Judd, 30 Minnesota, 126, 129, 130; J. S. Keator Lumber Co. *v.* St. Croix Boom Corp., 72 Wisconsin, 62, and the cases last cited.

"The construction adopted by the majority of the Court of Appeals seems to us at least equally untenable. It was held that the words 'meant only that the States should have legislative jurisdiction.' But jurisdiction, whatever else or more it may mean, is jurisdiction, in its proper sense of authority to apply the law to the acts of men. Vicat Vocab., sub. v. See Rhode Island *v.* Massachusetts, 12 Peters, 657, 718. What the Virginia Compact most certainly conferred on the States north of the Ohio, was the right to administer the law below low-water mark on the river, and, as part of that right, the right to serve process there with effect. State *v.* Mullen, 35 Iowa, 199, 205, 206. What more jurisdiction, as used in the statute, may embrace, or what law or laws properly would determine the civil or criminal effect of acts done upon the river, we have no occasion to decide in this case. But so far as applicable we adopt the statement of Chief Justice Robertson in Arnold *v.* Shields, 5 Dana, 18, 22: 'Jurisdiction, unqualified, being, as it is, the sovereign authority

to make, decide on, and execute laws, a concurrence of jurisdiction, therefore, must entitle Indiana to as much power—legislative, judiciary, and executive—as that possessed by Kentucky, over so much of the Ohio River as flows between them.'

"The conveniences and inconveniences of concurrent jurisdiction both are obvious and do not need to be stated. We have nothing to do with them when the law-making power has spoken. To avoid misunderstanding it may be well to add that the concurrent jurisdiction given is jurisdiction 'on' the river, and does not extend to permanent structures attached to the river bed and within the boundary of one or the other State."

We submit that with a very few exceptions the courts are unanimous in holding that the words "concurrent jurisdiction," when applied to territory, mean that each sovereign has authority to "make, decide on, and execute" laws over the same territory at the same time, and that the act under consideration conferred on each State the authority to extend her police regulations over the whole of the Columbia River, where it is a common boundary between them.

Any other construction would render the act of Congress, purporting to give Oregon jurisdiction with Washington over the Columbia River, a useless and vain enactment. Congress would be attempting to do something not within the purview of its powers. It will be remembered that at the time of the admission of Oregon into the Union, all adjoining territory on the north was owned by the Federal Government, which had the sole right of disposal of the same, and the only sovereign power authorized to legislate therefor, and it cannot be claimed that Congress could not bestow jurisdiction exclusive or concurrent over any part of the same. This was done while the Federal Government and the State of Oregon were the only parties interest-

ed, and their understanding of the act must bind the State of Washington, which was admitted many years thereafter.

The case of "The Annie M. Smull," 2 Sawyer 226, 1 Fed. Cases, page 983, Case 423, was decided June 25, 1872, and was the first federal construction of the act admitting Oregon, and held, as hereinbefore shown, that Oregon was given civil and criminal jurisdiction over the entire river. Oregon also asserted such jurisdiction by act of the Legislative Assembly of that State of February 18, 1887, entitled:

"An act to provide for the propagation and preservation of salmon and food fishes, in the public waters of the State of Oregon, including so much of the streams which form common boundaries between said State and adjacent Territories, and appropriating money therefor; also for the appointment of a fish commission." Laws of Oregon, 1887, page 37.

And section 1 of the act provides for the creation of a fish commission:

"That there shall be chosen biennially by the Legislative Assembly of the State of Oregon three competent persons who shall be denominated the fish commission, whose term of office shall continue two years and until their successors be chosen and qualified."

And section 4:

"It shall be the duty of the president to give his entire time and attention to the fishing interests of the State of Oregon, and by and with the advice and direction of the fish commissioners *see that all laws for the propagation, protection and preservation of food fishes in the public waters of the State of Oregon, whether entirely or partially within the State boundaries, are enforced;* to select and purchase suitable land, build, operate, and manage thereon a fish hatchery on the Columbia River, or on its tributaries, for the purpose of supplying said waters with young fish; to employ necessary and competent men to

successfully carry on the said hatchery on the Columbia River or on its tributaries; and to examine into and report upon the results of the salmon hatchery on Rogue River." (Italics ours.)

By said act a fish commission for the State was created, a fish hatchery on the Columbia River provided for, and a direction to the president of the commission to enforce all the laws of the State of Oregon relating to the propagation, protection and preservation of food fishes in the public waters of the State of Oregon, *whether entirely or partially within the State boundaries*, thus asserting jurisdiction over common boundary waters as well as those within the State. This act was passed after the Annie M. Smull decision, and in accordance with the doctrine of that case, and prior to the admission of Washington, and in no instance which has been called to our attention has the Federal Government ever denied or disputed the jurisdiction claimed by Oregon, nor did its courts doubt the same until long after the admission of the State of Washington. Great weight should be given the construction thus given the act by the Legislative Assembly of Oregon, and the federal court, at a time when no other State or sovereign power was interested in the matter, and which construction was not questioned for more than twenty years, from 1872 to 1895.

We admit that after Washington was admitted into the Union of States (1889) she began to take notice of the fishing industry on the Columbia River, and she sometimes enacts laws of a prohibitory nature, regulating the fishing industries of the State and excepting the Columbia River from the operation of the same. A glaring example of such legislation is her law prohibiting fishing with purse seines or nets in all the waters of the State

of Washington, except the Columbia River, and which exception caused the present trouble and the case at bar to determine the same.

The Washington statute reads as follows:

"*Hereafter it shall be unlawful to construct, own, operate and maintain within any of the rivers of this State flowing into Puget Sound,* and within said bodies of water within a distance of three miles from the mouth of any such rivers, and also within that arm of Puget Sound and body of water known as Deception Pass, or within one-half mile of the west entrance thereof, and in any of the other salt waters of this State at a greater depth than sixty-five feet at low tide, any pound net, trap, weir, fish wheel, or other fixed appliance, set lines excepted, for the purpose of catching salmon or other food fishes, and for the purpose of enforcing the provisions of this section the Fish Commissioner shall indicate the mouth of said rivers by driving piles therein. *It shall also be unlawful hereafter to use any purse net or other like seine within three miles and drag seine within one mile from the mouth of any of said rivers, or within said rivers;* provided, that nothing in this or any other act shall prevent any Indian residing in this State from taking salmon or other fish by any means at any time for the use of himself and family. (Laws 1899, p. 194, § 1; P. C., § 5273.)" (Italics ours.)

And in 1907, Chap. 247, Washington enacted the following, with an emergency clause:

"The use of pound nets, traps, weirs, fish wheels and other fixed appliances, and purse nets, drag nets, drag seines and other seines for catching salmon *is hereby authorized in all waters of this State wherein the same is not prohibited by section one,* subject to the regulation and license hereinafter provided for or otherwise required by law, and the use of set nets, and gill or drift nets, subject to said license and regulation for said purpose is authorized in all the waters of this State, except as otherwise provided by law; *provided, however,* that no fishing appliances shall be constructed, operated or maintained upon any of the waters of this State or the Columbia

River or its tributaries by any person whomsoever, unless such person shall have first obtained a license so to do from the Fish Commissioner of this State, who is hereby authorized to issue said license." (Italics ours.)

Under the latter section, the authorities of Washington issue licenses to use purse seines in the Columbia River. See stipulation of facts, record, page 4. Thus construing the prohibition of section 1 not to apply to the Columbia River.

It is plain that should the State of Washington continue to enact like discriminatory laws, she can destroy the fishing industry of the Columbia River, amounting to several millions of dollars annually, and Oregon cannot with all her hatcheries and vast expenditure of money to maintain the same, keep up the supply of fish.

In the State court, the defendant cited the following cases:

In re Mattson, 69 Fed. 535; (1895)
Ex parte Desjeiro, 152 Fed. 1004; (1907)
Roberts *v.* Fullerton, 117 Wis. 222; 93 N. W. R. 1111;

in support of his contention that neither State can enforce her penal laws beyond the "*medium filum aquæ*" Those are the only cases cited and we have discovered no others which in any way tend to support defendant's theory, and we wish to briefly discuss them.

The first, *In re* Mattson, 69 Fed. 535, was a decision by Judge Bellinger, concurred in by Judge Hanford, rendered July 25, 1895, and while not disclosed by the record, it is a matter of common knowledge, that at that time the fishermen from the two States engaged in fishing on the lower

Columbia were all aroused and ready to begin open war, and the decision was intended to allay the bitter feeling existing, and the judge attempts to distinguish the case from other cases holding contrary views; and from the language used by the court, in closing his decision (page 542), it is plainly disclosed that the court based its decision on the assumption that Oregon was endeavoring to enforce her legislation over Washington territory. He asks, How can this State more than Washington determine the right of the citizens of Washington to fish in the waters of that State? and other questions on the same theory, and then answers them by deciding that Oregon cannot legislate for Washington nor enforce her laws in Washington territory, and then justifies his opinion by saying that the common acceptation of the word "concurrent" means acting in conjunction. He cites no case which sustains that view, and utterly ignores all the cases holding that "concurrent jurisdiction," when applied to courts, means equal jurisdiction. State *v.* Sinnott, 35 Atl. 1007-8.

The meaning of the word "concurrent" is determined from the context. If both States were obliged to legislate jointly, or to enact the same laws, before either could enforce its legislation over the whole river, Congress in giving to each State concurrent jurisdiction over the river did a useless and futile act. It conferred no right or power. The two States could by treaty ratified by their respective legislatures or by enacting the same laws control the river without the consent of Congress. But we maintain that Congress intended to grant some power and legislative authority by giving her concurrent jurisdiction over the Columbia River, and it is plainly deducible that the police power of the State was to be extended over the whole river,

"jurisdiction in civil and criminal cases upon the Columbia River," is the language of the enabling act.

Ex parte Desjeiro is a case lately decided by Judge Wolverton, reported in 152 Fed Rep. 1004, and was decided on the strength of the Mattson case. No other case is cited in the decision, and Judge Wolverton quotes the language of Judge Bellinger, above referred to, and then follows the decision. But in neither case is the decision of Judge Deady *in re* "The Annie M. Smull," 2d Sawyer 226, referred to, nor is the reasoning of said case shown to be unsound.

The only other case cited by the defendant is the case of Roberts *v.* Fullerton, 93 North Western 1111 (Wis.) That case endeavors to distinguish between criminal and police regulations relative to the catching of fish, but is really based upon the theory and proposition that one State cannot legislate and enforce its laws within the boundaries of another State, evidently giving the same construction to the words "concurrent jurisdiction" as given in the Mattson and Desjeiro cases. No other cases are cited by the defendant and we have been unable to find any others which sustain defendant's position. The great weight of authority is to the contrary, as shown by the cases hereinbefore cited. The Wisconsin case above mentioned was by a divided court, and Mr. Justice Dodge rendered a very able dissenting opinion, reviewing many cases and setting forth the reasons for concurrent jurisdiction, and holds that it confers the right to extend the police powers of the State over the territory in which concurrent jurisdiction is granted, and cites many cases in support thereof, and announces the same doctrine announced by Judge Deady in the "Smull" case, and the authorities cited in this

brief, and said dissenting opinion is evidently in line with the manifest intention of Congress in granting concurrent jurisdiction, and with the weight of authority and sound reason, unless we can hold that Congress had not the power to grant such jurisdiction, and unwittingly passed a useless act, which will not be presumed. There is no claim of lack of power to grant jurisdiction to Oregon, concurrently, with any other State or Territory over any waters or land adjoining the State, owned by the Federal Government at the date of the act admitting the State.

We call special attention to said dissenting opinion of Justice Dodge, and for the reason it is so ably and logically reasoned, cites so many cases, and for convenience, we make the same a part of this brief. The judge says, pages 1116 to 1118:

"I am unable to concur in the conclusion reached by the court in this case, for the reason that I am unable to distinguish between criminal and police legislation of the State addressed to the subject of catching or destroying fish, and police or criminal legislation relating to other subjects. That the concurrent jurisdiction enjoyed by the several States of the Union over the water boundaries separating them from other States includes the promulgation of such legislation extending over such boundary waters, and the enforcement thereof in the manner prescribed by such legislation, whether by courts or by executive officers, is supported by the whole current of authority, and, so far as my examination has gone, is denied by no decided case. In McFall *v.* Commonwealth, 2 Metc. (Ky.) 394, it is said: 'Jurisdiction * * * as used in the compact (for concurrent jurisdiction) imports nothing more than the power to govern by legislation,' and in that case was sustained a conviction of an Ohio justice of the peace for solemnizing a marriage midway upon the Ohio River, contrary to the statutes of Kentucky, for the reason, expressly stated, that no statute of Ohio expressly authorizing him so to do had been pleaded or shown. In Carlisle *v.* State, 32 Ind. 55, it was held that the statutes

of Indiana prescribing the facts which should constitute murder, and the punishment therefor, applied to an offense committed outside of its territorial boundary, but upon the Ohio River, over which that State has concurrent jurisdiction. In Sherlock *v.* Alling, 44 Ind. 184, and Memphis & Cinc. Packing Co. *v.* Pikey, 142 Ind. 304; 40 N. E. 527, it was held that the statutes of Indiana imposing liability in damages for negligently causing death extended over the Ohio River by virtue of the same provision, and applied to persons navigating the same, independent of citizenship. In Dugan *v.* State, 125 Ind. 130; 25 N. E. 171; 8 L. R. A. 321, laws prohibiting Sunday labor were held so applicable to one acting as a pilot upon the river, but not engaged in interstate commerce; and in Welsh *v.* State, 126 Ind. 71; 25 N. E. 883; 8 L. R. A. 664, a statute prohibiting the sale of intoxicating liquor without a license was so applied. In State *v.* Mullen, 35 Iowa, 199, a statute of Iowa against maintaining a house for prostitution, and authorizing its seizure and condemnation, was held to apply to a houseboat moored on the Illinois side of the Mississippi River, and to justify arrest of the offender there, and seizure and condemnation of the offending implements and property. In State *v.* George, 60 Minn. 503; 63 N. W. 100, the concurrent jurisdiction was held to warrant conviction under the Minnesota law for larceny committed on a bridge across the Mississippi River, at a place east of the center of the stream, and therefore over Wisconsin territory; the court having first held that the act upon the bridge crossing the river was equivalent to the same act upon the surface of the river. It was there said: 'Some of the purposes of this concurrent jurisdiction are to enforce proper police regulations on the river.' The principle of these cases was adopted at a very early day in Wisconsin in State *v.* Cameron, 2 Pin. 490, 495, where it was decided that, by virtue of the concurrent jurisdiction of Wisconsin over the Mississippi River, its laws defining and punishing murder extended over those waters, and justified prosecution and punishment for a crime there committed, but outside of Wisconsin territory. Again, in Keator L. Co. *v.* St. Croix Boom Corp., 72 Wis. 62; 38 N. W. 529; 7 Am. St. Rep. 837, it is decided that 'concurrent jurisdiction,' in the sense that only legislative acts adopted by both States can have ef-

fect over the boundary waters. General discussion of the subject will be found in Rorer, Inter-St. Law, c. 34.

"As I have already said, no case has been found or cited negatively the principle announced by these cases and already adopted by our own State. Their authority is at least not expressly questioned in the opinion filed on behalf of the court in this case, nor is there suggested any reason why, upon that principle, the concurrent jurisdiction 'does not include the right to regulate the enjoyment, by the people of one State, within its domain, of rights incident to their situation, such as the right to navigate or fish.' As I have already said, I am wholly unable to see why the conduct of a man in fishing upon a river is not as legitimately the subject of police regulation as the conduct of the man who is selling liquor, piloting a boat or maintaining a disorderly house. At many places in the United States, harbors are situated so as to be within the concurrent jurisdiction of different States. These harbors must be policed, and subject to the paramount authority of the United States when that authority is exercised, the safety of the use of that harbor must be preserved. The speed of boats, the giving of signals, the carrying of lights, the location for purpose of anchorage—all are subjects customarily regulated, in some degree at least, by the local authorities, and are, it seems to me, directly within the scope which has been accorded to this concurrent jurisdiction. It is said in the opinion of the court, speaking of the Great Lakes between Canada and the United States, as in analogy to the case of States with concurrent jurisdiction, that 'no one would venture to say that one country could enforce its laws for the preservation of fish, or regulating the taking of fish, within the territorial limits of the other.' If this means upon the coterminous water boundaries, and it were conceded that concurrent jurisdiction existed in the same sense that it does by express provision between adjoining States, I think this assertion is rather too broad. I, for one, do venture the opinion that in such case each country could assert the right to regulate and punish certain methods of taking fish, dangerous to or destructive of the industry. Strangely enough, no case is cited in which such right has so much as been questioned, while, in the argument of so distinguished a lawyer and jurist as Mr. Phelps before an international tribunal, it was gravely

contended, and of course sincerely, that, even upon the high seas, reasonable and proper regulation of the taking of fish by one country would, on the doctrine of comity, be deferred to by others, and permitted to be enforced against their citizens. 1 Moore's Hist. & Dig. of International Arbitration, p. 843. Further, it is discoverable that, in the compact between New York and New Jersey defining the middle of the harbor as the territorial limit, and granting to New York jurisdiction over the entire waters, New Jersey expressly excepted and reserved the right to regulate fisheries in her part of the harbor, clearly evincing the understanding of the parties that otherwise jurisdiction included authority for such regulation, and exclusive in New York would exclude New Jersey therefrom. Article 3, § 3, Compact N. Y. and N. J., printed 48 Barb. 505.

"I do not discuss what is made the basis for a considerable portion of the court's opinion, namely, the question whether under any circumstances one State can prevent the obstruction and impairment of the usefulness of the river by permanent structures so affixed to the ground that they become, not river, but part of the solid territory of the opposing State, on which see People *v.* C. R. N. J., 48 Barb. 478. I forego this discussion for the reason that the question is not here presented. It is ruled in the opinion, with my entire concurrence, that the placing of the net in the waters of this lake gave it none of the characteristics of such fixture; that it no more became a part of the land of Wisconsin than would a boat because anchored to the bottom, which was the case presented in Welsh *v.* State, *supra.*

"A suggestion was made in argument that, by recognizing the law of Minnesota as a justification to her officer, we should in effect be enforcing her criminal laws, which, confessedly, no other sovereignty can do. Wisconsin *v.* Pelican Ins. Co., 127 U. S. 265; 8 Sup. Ct. 1370; 32 L. Ed. 239. Such argument embodies a fallacy. It would not be enforcing the criminal laws of Minnesota to merely recognize that they constitute a defense to her officers when acting under them within her jurisdiction. The argument, if sound, would make every sheriff liable in trespass for every arrest whenever personal jurisdiction over him could be acquired in any other State, for he must

admit the trespass, and could not invoke the law of his official residence and action as a defense.

"To summarize my view: This State, having decided that its concurrent jurisdiction enables it to define and punish a crime upon boundary waters but in the territorial limits of Minnesota, cannot deny to that State the same right upon those waters."

It was urged in the State court by the plaintiff in error that the opinion of the Federal Court, construing a statute of the United States, is entitled to respectful consideration by a State Supreme Court, and if not manifestly unsound should be followed, and citing Franklin *v.* Kelley, 2 Neb. 79. With this we are in full accord, but respectfully remind the plaintiff in error that the Federal cases cited in his brief are in direct conflict with a prior Federal case, to-wit: "The Annie M. Smull," 2 Sawyer, referred to in this brief, and in fact there is only one case, and that a State case, the Roberts-Fullerton case, by a divided court, hereinbefore mentioned and discussed, which in any way tends to sustain the two Federal cases cited in defendant's brief, while the doctrine announced in them has been held unsound in many State courts, as well as the Federal courts, including the Supreme Court of the United States, as herein clearly shown.

III.

No common-law crimes in Oregon—if court can punish for one crime committed on the river it can for all.

The plaintiff in error admitted in the State court the proposition that concurrent jurisdiction would permit Oregon to punish, even though committed near the Washington shore, and north of the boundary line between the two Sates, all offenses which

were crimes at common law. The courts of Oregon have frequently held that there are and never has been common-law crimes in the State. Only crimes and misdemeanors embraced in the statute are indictable, or were or could be indictable at the time of the admission of Oregon, jurisdiction over common-law offenses being denied to the United States courts. We hardly think this needs any extended argument, or citation of authorities, but call attention to the following cases:

State *v.* Vowels, 4 Or. 324, 326.
State *v.* Gaunt, 13 Or. 115, 120.
State *v.* Nease, 46 Or. 433, 438.

In the case of State *v.* Gaunt, reported in 13 Oregon 115, the court says, at page 120:

"Had the criminal code made the common-law rule a statutory rule also, the case would have been met; but as the case stands, disobedience to a statute, considered as a contempt, as which it was indictable only where the statute had provided no penalty, is not a statutory misdemeanor. As for a misdemeanor at common law, no indictment will lie, because we have no indictable common-law offenses in this State. (McArthur, J., in State *v.* Vowels, 4 Or. 326.) We may look to the common law for definitions of crimes, but not for the crimes themselves. (United States *v.* Coolidge, 1 Gall. 489.) The statute may as much be said to declare the act of selling without a license a felony as a misdemeanor. The court cannot declare which was intended, and could not have said so at common law, but could say at common law that disobedience to a statute was a contempt of the statute, and indictable as such. The denial of jurisdiction over common-law offenses to the courts of the United States seems to have led to the same result. Thus it is laid down in United States *v.* New Bedford Bridge, 1 Wood. & M. 401, 439, 'that if Congress does not declare particular acts to be offenses, and prescribe the extent of the punishment

and place of trial, though the subject-matter is within the powers granted to the general government, no particular court has any right to try a person for doing these acts, or affix any punishment to them, as every court under the general government is limited to the trial and punishment of such matters, and such only, as Congress has been pleased to confide to it.' "

Therefore, if the State has power to punish any crime whatever committed on the river, it has power to punish all, as all are statutory crimes punishable according to the penalties provided in the statute, and the power of the State to declare any violation of its police regulations a crime, and provide an appropriate penalty, cannot be doubted.

IV.

The right to fish in tide waters is a common right, and not a privilege granted by statute, and it may be regulated by the sovereignty having jurisdiction.

Chief Justice Bean says, in his decision of this case, reported in 95 Pacific 720, and set forth in the record herein, pages 7 to 11, inclusive, at page 722 in said report, that:

"It is argued that Washington by issuing a license to defendant to fish with a purse net has made lawful that which the State of Oregon has declared to be an offense, and that a citizen of the former state, who has complied with its laws, ought not to be punished for violating a law of this State. But the license did not confer upon defendant the right to fish. It was a mere regulation of an existing right, and hence the enforcement of a law of this State prohibiting fishing with certain appliances does not deprive defendant of a right granted to him by an adjoining State, but is an additional limitation and restriction on his common right and one by reason of its jurisdiction over the river, we think, it had power to enact."

And further, he says:

"Fish being *ferae naturae*, while in state of nature, may of common right be captured and taken from navigable waters by any one unless forbidden by the law-giving power. 2 Farnham, Water and Water Rights, 1361. But because an indiscriminate exercise of this common right would speedily result in the destruction of fish, the sovereignty having jurisdiction over the waters, under its police powers, may regulate or restrict the exercise of this right for the common good,"

And citing:

State *v.* Schuman, 36 Or. 16; 58 Pac. 661; 47 L. R. A. 153; 78 Am. State Rep. 754;

Haggerty *v.* St. Louis Ice Manufacturing & Storage Company, 143 Missouri 238; 44 S. W. 1114; 40 L. R. A. 151; 65 Am. State Rep. 647;

Smith *v.* State, 155 Ind. 611; 58 N. E. 1044; 51 L. R. A. 404;

And then continues:

"And in our opinion, where adjoining States have concurrent jurisdiction on the waters forming their boundaries, the laws of each State, regulating the common right to take fish from such waters, are valid and binding, when not in conflict; and if there is a conflict, the law of that State which is the most restrictive in its character must prevail, and to that extent the State which first assumes has jurisdiction to the exclusion of the other."

In State *v.* Schuman, above cited, the court holds that:

"The sale of a commodity may be subject to the exercise of police powers, although its use would not necessarily subvert the morals, impair the health, or disturb the peace of society."

And in Smith *v.* State, cited, 155 Ind. 611, the court holds that:

"Under the provisions of section 2209, Burns Statutes, 1894, one having in his possession quail during a closed season as therein provided is liable to punishment therefor, although the quail came into his possession during the open season."

And in Haggerty *v.* St. Louis Ice Manufacturing & Storage Company, 143 Missouri 238; 40 L. R. A. 151, it is held, page 153:

"In the first place, then, we have already shown, and, indeed, it cannot be denied that by the laws of nature every man, from the prince to the peasant, has an equal right to pursue and take to his own use all such creatures as are *ferae naturae* and, therefore, the property of nobody, but liable to be seized by the first occupant, and so it was held by the imperial law, even so late as Justinian's time, but it follows from the very end and constitution of society that this natural right, as well as many others, belonging to men as an individual, may be restrained by positive laws enacted for reasons of state, or for the supposed benefit of a community. 2 Blackstone's Commentaries, page 410."

On page 154, the court says:

"It is true, the offense is but *malum prohibitum*, but the consequences are the same as if the act were *malum in se*, since in principle there is nothing which should cause the result to differ in the former case from the latter. The law will not stultify itself by prohibiting on the one hand what it permits on the other."

CONCLUSION.

We respectfully submit that in view of the facts above set forth, and that for more than twenty years the right herein claimed by the defendant in error was exercised without objection and in accord with the judicial sanction of the only sovereign power which had a right to protest, and of the act admitting Oregon into the Union of States,

and in the light of the authorities herein cited and freely quoted, the State of Oregon has authority to extend her police powers over the entire waters of the Columbia River where the same forms a common boundary, to the extent of regulating the taking of fish therein and commerce thereon, subject only to the powers of the Federal Government relative to navigation, interstate and foreign commerce.

A. M. CRAWFORD,
Attorney General,
Attorney for Defendant in Error.

A. M. CRAWFORD,
I. H. VAN WINKLE,
Counsel for Defendant in Error.